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IN THE

# Supreme Court of the United States

ROBERT A. JONES, Assistant Deputy Superintendent of Program Services, and DONALD SELSKY, Director, Special Housing/Inmate Disciplinary Programs,

*Petitioners,*

*v.*

JOSE PERALTA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Under *Edwards v. Balisok*, 520 U.S. 641 (1997), and *Heck v. Humphrey*, 512 U.S. 477 (1994), a prison inmate may not use 42 U.S.C. § 1983 to challenge the validity of a prison disciplinary proceeding that resulted in the deprivation of good time credits.

The question presented is whether the rule of *Balisok* and *Heck* applies to bar a challenge to a prison disciplinary proceeding that resulted in mixed sanctions — both loss of good time and a change in the conditions of confinement — if the prisoner abandons any claim affecting the loss of good time credits.

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## OPINIONS BELOW

The opinion of the Second Circuit, reported at 467 F.3d 98 (2d Cir. 2006), is set forth in Appendix A (App. 1a-17a). The memorandum order of the district court, dated April 26, 2004 and reported electronically at 2004 U.S. Dist. LEXIS 7311, is set forth in Appendix B (App. 18a-23a). The order of partial dismissal of the district court, dated December 10, 2002, is set forth in Appendix C (App. 24a-27a). The order of the Second Circuit denying petitioners' motion for rehearing or rehearing en banc is set forth in Appendix D (App. 28a-30a).

## STATEMENT OF JURISDICTION

The opinion of the Second Circuit was issued October 17, 2006. Petitioners' petition for rehearing or rehearing en banc was filed October 30, 2006 and denied by order issued December 27, 2006. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1) (2000).

## STATEMENT OF THE CASE

In November 2000, respondent Jose Peralta, a prisoner in the custody of the New York State Department of Correctional Services ("DOCS"), filed a *pro se* complaint under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York. Pursuant to an order of the district court dated April 16, 2001, Peralta filed an amended complaint in June 2001. The amended complaint named as defendants three DOCS employees —

petitioners Robert Jones and Donald Selsky, and Sandra Vasquez[1] — as well as two state appellate judges and two clerks of the court on which they serve.[2] Peralta implicitly invoked the district court's jurisdiction under 28 U.S.C. § 1331, by claiming that he was denied procedural due process in a prison disciplinary proceeding.

In the amended complaint, Peralta alleged that he was charged with a number of prison rule violations stemming from an incident in which another prisoner was slashed with a weapon. He was found guilty at the disciplinary hearing and ultimately sentenced, after the penalty was modified on administrative appeal, to restrictive confinement in the Special Housing Unit ("SHU") for 24 months, loss of privileges for the same amount of time, and 24 months loss of good time. He claims he was denied procedural due process in the disciplinary proceeding, including the rights to "adequate assistance,

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1. It does not appear that Vasquez was served with process, and she has not requested representation by this office. For that reason, the motion to dismiss in the district court was made solely on behalf of Jones and Selsky and only they are petitioners here. The motion to dismiss did note that the court could dismiss as to Vasquez *sua sponte* pursuant to 42 U.S.C. § 1997e(c). However, both the district court and the Second Circuit dealt with the named DOCS defendants, including Vasquez, collectively.

2. The complaint was dismissed against the judges and clerks *sua sponte* by order of the district court dated December 10, 2002 on the ground of judicial immunity. App. 24a-27a. Peralta did not challenge this order in the Second Circuit.

witnesses, and a fair and impartial hearing officer, and a fair and impartial appeal officer" (Amended Complaint ¶ 20). Vasquez was Peralta's employee assistant for the hearing, Jones was the hearing officer, and Selsky determined his administrative appeal.

Peralta's amended complaint further states that he commenced a proceeding in state court to challenge the determination, and that the proceeding was dismissed because he did not pay the court's $250 filing fee.[3]

Petitioners moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on August 1, 2003, based upon *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997). Those cases established that a prisoner does not have a cognizable claim under § 1983 to challenge the validity of the procedures that led to a disciplinary determination affecting the duration of his

3. If Peralta's account of what occurred in state court is true, it was an anomaly. State law provides for reduced filing fees for prisoners who have insufficient means to pay full fees and states unequivocally that "in no event" shall a prisoner be prohibited from proceeding for lack of funds. *See* N.Y. C.P.L.R. § 1101(f)(1), (2). If a court determines that a prisoner lacks sufficient funds to pay the full fee, a reduced fee will be set. The case will proceed, and any portion of the reduced fee that the prisoner is unable to pay will be recorded by DOCS as an outstanding obligation to the court and will be collected from the prisoner's future income. *See* DOCS Directive No. 2788, Section VIII *available at http://www.docs.state.ny.us/directives.html* (last visited March 21, 2007).

confinement. Instead, he may seek relief under § 1983 only if he shows that the determination has been judicially or administratively invalidated previously. Petitioners argued that because the disciplinary proceeding here resulted in loss of good time, and Peralta's claims, if accepted, would necessarily imply the invalidity of the disciplinary determination, *Balisok* required that his complaint be dismissed in the absence of a showing that the determination had been previously invalidated — a showing he did not and could not make. Petitioners argued that *Heck* and *Balisok* were applicable because Peralta was penalized by loss of good time, even though he was also penalized by being placed in restrictive confinement. Peralta opposed the motion, claiming that he should be allowed to proceed because he was not seeking damages for the loss of good time, but only for the restrictive confinement. The district court dismissed the complaint on April 26, 2004, finding that Peralta's allegations "would, if proven, 'necessarily imply the invalidity of the deprivation of his good-time credits,' as well as his confinement in SHU." App. 21a (quoting *Balisok*, 520 U.S. at 646).

Peralta filed a *pro se* appeal, and the Second Circuit did not hear argument. Nonetheless the Court vacated the dismissal and remanded for further proceedings. The court held that *Heck* and *Balisok* do not control the case where a prisoner seeks to challenge a disciplinary proceeding that results in "mixed" disciplinary sanctions (*i.e.*, both loss of good time and, usually, a period of restrictive confinement). In such a case, the Second Circuit held

that the prisoner may proceed with a § 1983 claim "*if he is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement.*" App. 12a-13a (emphasis in original). The case was remanded to the district court to make the following determination:

> whether Peralta has formally agreed, or is then willing, to waive all his potential claims with respect to the sanctions affecting the duration of his imprisonment arising out of the proceeding he is currently challenging. If such a waiver results, the district court must allow Peralta to proceed separately with his challenge under § 1983 to the sanctions affecting the conditions of his confinement.

App. 16a-17a. Petitioners sought rehearing or rehearing en banc, arguing that the decision was fundamentally inconsistent with *Heck* and *Balisok*, that the decision would have serious, unintended consequences for prison and court administration in New York, and that the decision had the potential to expand significantly the federal courts' prisoner caseload. Petitioners urged the court of appeals to provide an opportunity for further briefing before implementing such a significant change. The court denied the petition for rehearing without comment by order dated December 27, 2006. App. 28a-30a.

## REASONS FOR GRANTING THE PETITION

### I. The Second Circuit's decision conflicts with decisions of the Seventh, Eighth, and Ninth Circuits.

Four courts of appeals have considered the question presented by this case. Three of them have decided that a prisoner may not use 42 U.S.C. § 1983 to challenge the validity of a prison disciplinary determination that deprives the prisoner of good time credits or otherwise affects the *duration* of confinement, regardless of whether sanctions affecting the *conditions* of confinement were also imposed. The Second Circuit alone has announced a novel rule permitting a prisoner to maintain an action under § 1983 in just such a case of "mixed" disciplinary sanctions, if he permanently abandons any challenge to the duration of confinement. There is thus a square conflict among the circuits warranting review by this Court.

The background for this controversy may be simply stated. In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), prisoners sought injunctive relief under 42 U.S.C. § 1983 to restore good-time credits that had been lost in prison disciplinary proceedings. This Court held that a prisoner seeking such relief may not proceed under § 1983, but may seek relief in federal court only by a petition for habeas corpus under 28 U.S.C. § 2254. *Preiser* established that § 1983 may be used to challenge conditions of confinement, but not to challenge the fact or duration of confinement.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Court again considered the "intersection" between § 1983 and habeas corpus. There, a prisoner sought damages, but not equitable relief, under § 1983 for an allegedly unconstitutional criminal conviction. Analogizing the prisoner's claim to the tort of malicious prosecution, the Court held that where "a judgment in favor of the plaintiff would *necessarily imply the invalidity of his conviction or sentence* . . . the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487 (emphasis added).

Finally, in *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court held that the *Heck* rule applies not only to convictions but also to prison disciplinary proceedings affecting the duration of confinement, as by the loss of good time credits. Under *Balisok*, where "[t]he principal procedural defect complained of by [the prisoner] would, if established, necessarily imply the invalidity of the deprivation of his good-time credits" (520 U.S. at 646), the prisoner may seek damages or other relief only if the invalidity of the proceeding has previously been established either administratively or by the courts. On the other hand, because § 1983 may be used to challenge conditions of confinement but not the fact or duration of confinement, a prisoner may use § 1983 to bring a challenge to a disciplinary determination if that challenge "threatens no consequence" to the duration of confinement. *Muhammad v. Close*, 540 U.S. 749, 751 (2004).

Four courts of appeals have considered whether, under the rule of *Preiser* and *Heck*, a § 1983 complaint may be brought to challenge a prison determination that affects both the conditions and duration of confinement. The Seventh, Eighth, and Ninth Circuits have all held that it may not.

In *Sheldon v. Hundley*, 83 F.3d 231 (8th Cir. 1996), the Eighth Circuit considered a prisoner's § 1983 action for damages challenging a disciplinary determination that had resulted in both disciplinary detention and loss of good time. Correctly anticipating this Court's holding in *Balisok*, the Eighth Circuit held that the claim for damages was barred because it would require a court to determine the validity of a disciplinary proceeding that resulted in loss of good-time credits, and such a claim was barred by the principle of *Heck*. The Eighth Circuit applied the bar notwithstanding the fact that this was a case of mixed sanctions, involving "both the loss of good-time credits and the disciplinary detention." 83 F.3d at 233. *See also Portley-El v. Brill*, 288 F.3d 1063, 1067 (8th Cir. 2002) ("Because [plaintiff] seeks damages for the *imposition* of discipline that *included* the loss of good time credits," his claim is barred by *Heck*) (emphasis on "included" added). Thus, the Eighth Circuit rule is that a prisoner may not use a damages action under § 1983 to challenge the validity of a prison disciplinary proceeding that results in both loss of good time and other sanctions.

The Seventh Circuit reached the same conclusion in *Post v. Gilmore*, 111 F.3d 556 (7th Cir. 1997). In

that case a prisoner had commenced separate, parallel actions in the district court for both habeas relief and damages under § 1983. Both actions challenged the same prison disciplinary proceeding, which had resulted in both disciplinary segregation and loss of good time. The prisoner sought restoration of his lost good time in the habeas proceeding, and damages for, *inter alia*, his disciplinary segregation in the § 1983 action. The district court dismissed the habeas petition as duplicative of the § 1983 action, but the Seventh Circuit reversed, citing *Heck*, and directed the district court to adjudicate the habeas petition first because "[plaintiff's] § 1983 cannot succeed unless he first prevails on the very [habeas] claim the court has dismissed." 111 F.3d at 557. Thus, the Seventh Circuit held that a § 1983 action would not lie to challenge a disciplinary action resulting in mixed sanctions, even if the prisoner sought in that action to challenge only those sanctions relating to the conditions and not the duration of confinement. *See also Montgomery v. Anderson*, 262 F.3d 641, 643-44 (7th Cir. 2001) (noting that plaintiff could not seek damages under § 1983 for his disciplinary segregation because the disciplinary proceeding, which also affected his ability to earn good time, had not been invalidated in a habeas corpus proceeding).

The Seventh and Eighth Circuits reached this conclusion on the basis of *Heck*, without benefit of this Court's decision in *Balisok*. Prior to *Balisok* the Ninth Circuit took a different view of the matter, permitting a prisoner to seek damages under § 1983 for the alleged violation of his due process rights in a disciplinary proceeding that resulted in both

disciplinary segregation and loss of good time. *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995). But after this Court vacated and remanded for reconsideration in light of *Balisok* (*see* 520 U.S. 1238 [1997]), the Ninth Circuit dismissed the claim, 122 F.3d 39 (9th Cir. 1997), holding that "[*Balisok*] forecloses [plaintiff's] *entire* compensatory claim under 42 U.S.C. § 1983" (emphasis added). 122 F.3d 39.

Only the Second Circuit, in the decision below, has reached a contrary result, holding that a prisoner may use § 1983 to challenge a disciplinary proceeding that resulted in mixed sanctions. Although the prisoner in such a case is challenging the validity of a determination that affects the duration of his confinement, under the Second Circuit's rule the action will nevertheless be exempt from the *Preiser-Heck-Balisok* bar if the relief sought is limited to the conditions of confinement and the prisoner abandons any claim for relief related to the loss of good time. Thus, there is a stark conflict among the circuits on a question that has wide impact on the litigation of prisoner claims in the federal courts. The conflict warrants resolution by this Court.

## II. The Second Circuit's decision is inconsistent with decisions of this Court.

As set forth above, beginning with the seminal decision in *Preiser*, 411 U.S. 475, this Court has carefully shaped the principles that determine when the federal courts may entertain actions under § 1983 by prisoners seeking to challenge prison disciplinary

proceedings. In this case, the Second Circuit, while purporting to defer to those principles, has in fact distorted and undermined them. Because the decision below is inconsistent with decisions of this Court on an important matter of federal jurisdiction, the Court should grant certiorari.

*Preiser*, *Heck* and *Balisok* are based on the principle that habeas corpus, with its core requirement that a prisoner exhaust available state judicial remedies before resorting to the federal courts, is the only proper federal vehicle to challenge the fact or duration of state confinement. This principle, in turn, is deeply rooted in considerations of federal-state comity. Thus, under *Balisok*, where a prisoner seeks damages stemming from the procedures that led to loss of good time, and accepting his claimed errors would necessarily imply the invalidity of the proceeding, he has no cognizable claim under § 1983. 520 U.S. at 648. Such a challenge is a challenge to the duration of confinement, regardless of whether the prisoner only seeks damages not associated with the good time loss, and a § 1983 action does not lie.

This plain reading of *Balisok* is supported by *Wilkinson v. Dotson*, 544 U.S. 74 (2005), where the Court determined that § 1983 was available because the claim — that certain parole procedures were constitutionally inadequate — would not implicate the validity of the plaintiffs' convictions or sentences. The Court discussed "the legal journey from *Preiser* to *Balisok*," and synthesized the decisions in terms that are fatal to the Second Circuit's approach:

> These cases, taken together, indicate that a state prisoner's § 1983 action is barred

> (absent prior invalidation) — no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) — *if* success in that action would necessarily demonstrate the invalidity of the confinement or its duration.

544 U.S. at 81-82 (emphasis in original).

The Second Circuit's decision cannot be reconciled with this Court's holdings as summarized in *Wilkinson*. In this very case, Peralta's complaints — including, as in *Balisok*, the claim that the hearing officer was biased — would, if accepted, demonstrate the invalidity of the deprivation of good time credits. Even if Peralta seeks relief for only the conditions and not the duration of his confinement, the relief would be predicated on a finding that would necessarily invalidate the duration of confinement as well. Accordingly, Peralta's claim is not cognizable under § 1983.

The Second Circuit attempted to reconcile its holding with the decisions of this Court by announcing a new procedure by which a prisoner could, by waiving his challenge to the duration of confinement, convert a claim barred by *Heck* and *Balisok* into one that would not be subject to the bar:

> We today hold that a prisoner subject to such mixed sanctions can proceed separately, under § 1983, with a challenge to the sanctions affecting his conditions of

> confinement without satisfying the favorable termination rule, *but that he can only do so if he is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement.*

App. 12a-13a (emphasis in original). This novel procedure, created out of whole cloth, is itself inconsistent with the rationale of *Balisok*.

Under *Heck* and *Balisok*, § 1983 cannot be used to attack a proceeding, if success on the claim would necessarily demonstrate the invalidity of the prisoner's length of confinement, unless the proceeding has previously been set aside administratively or by the courts. Whether the claim is barred is a threshold matter to be resolved by examining the implications of his claim when the action is commenced. As this Court stated in both of those decisions, the question is whether the asserted claim is cognizable under § 1983 at all. *Heck*, 512 U.S. at 483; *Balisok*, 520 U.S. at 643. If it is not, the claim must be dismissed. Thus, the bar to suit is not susceptible to the control or manipulation of the prisoner in the way the Second Circuit has devised. Rather, the invalidation requirement is a precondition to suit, akin to an element of the cause of action, without which there is no viable lawsuit *ab initio*. The prisoner's agreement to forego specific remedies cannot create a cognizable claim where none exists.

Moreover, if the Second Circuit's approach is permitted to stand, it will destroy the clarity this

Court has brought to the question of when the statute of limitations begins to run. In *Heck*, after reiterating that where the decision applies, no cause of action exists until the underlying determination has been invalidated, the Court observed:

> Under our analysis the statute of limitations poses no difficulty while the state challenges are being pursued, since the § 1983 claim has not yet arisen. Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor [citations omitted], so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.

512 U.S. at 489-90. On the other hand, if a prisoner's claim is not subject to the invalidation requirement, it accrues when he knows of the injury (*see, e.g., Pearl v. City of Long Beach*, 296 F.3d 76, 79-80 [2d Cir. 2002]), which would generally be when the determination is issued and he begins serving the penalties imposed. *Cf. Wallace v. Kato*, __ U.S. __, 127 S. Ct. 1091, 1097 (2007) (tort claim accrues and statute of limitations begins to run when wrongful act or omission results in damages). Thus, if the Second Circuit's view prevails, a § 1983 action challenging a single prison determination that imposes mixed sanctions would be subject to two different accrual dates. Such ambiguity serves neither prisoners nor correctional officials.

## III. The decision below is unworkable, because it places prison officials and the state courts in an untenable position.

The regime created by the Second Circuit's decision assumes that a prisoner can make an enforceable waiver of his challenge to the duration of confinement, in order to challenge the conditions of confinement in an action pursuant to § 1983. But that assumption blinks reality. Suppose a prisoner elects to challenge only the conditions and not the duration of confinement, in order to avoid the bar of *Heck* and *Balisok*. If a federal court then determines that the disciplinary proceeding was constitutionally defective, prison officials will be ordered to release the prisoner from disciplinary confinement, but not to restore lost good time.

But for several reasons, that puts prison administrators in an untenable situation. First, the failure to restore good time in those circumstances would be perceived by the prison population as a flagrant violation of constitutional rights, despite any waiver made by the prisoner in the § 1983 action. This would have a serious negative effect on prison security.

Furthermore, it is by no means clear that state law would permit DOCS to do what the Second Circuit invites. Under state law, DOCS must expunge a disciplinary determination that has been judicially or administratively annulled, and neither it nor any other state agency may rely on it for any purpose.

*See, e.g., Matter of Blanche v. Travis*, 760 N.Y.S.2d 919 (App. Div. 2003) (parole board cannot rescind open parole release date relying on disciplinary determinations that were reversed and expunged by DOCS on administrative review); *Matter of Davidson v. Coughlin*, 546 N.Y.S.2d 247, 248 (App. Div. 1989) ("It is beyond argument that allowing references to charges that have been dismissed ... to remain in prisoners' records leaves inmates in jeopardy of having these references unfairly used against them."); *Matter of Garrett v. Coughlin*, 516 N.Y.S.2d 796, 797 (App. Div. 1987) ("'[the] mere potential for an indirect penalty being imposed upon prisoners for infractions for which guilt is not established places prisoners in a shockingly unfair status.'"). Thus, where a federal court has effectively annulled a disciplinary determination, DOCS may not be free to ignore the court's findings. *Cf. Heck*, 512 U.S. at 498 (Souter, J., concurring) (success by a plaintiff in a § 1983 claim for damages challenging his conviction or sentence would, as a practical matter, compel the state to release the prisoner).[4]

On the other hand, if DOCS defers to the federal court's decision as a matter of propriety, or due to concerns for internal security or because of state law requirements, then *Preiser*, *Heck* and *Balisok* are

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4. Thus, the Second Circuit's suggestion that its waiver procedure is analogous to a waiver of a severable, independent ground for relief (App. 14a n.7) is unpersuasive. Rather, the prisoner is being asked to waive the necessary, logical consequences that would flow from a decision in his favor.

completely eviscerated. Prisoners will effectively have shortened the duration of their confinement in a § 1983 action rather than by a petition for habeas corpus, in violation of the principles developed by this Court over the course of decades.

The Second Circuit's rule places the state courts in a similarly untenable position. If DOCS declines to restore the prisoner's good time and, despite the waiver, the prisoner sues DOCS in state court, the court has two equally unpalatable choices. If the state court enforces the waiver, it gives its imprimatur to what a federal court has determined is an unconstitutional deprivation of good time. Alternatively, if the state court concludes that the waiver cannot or should not be enforced, then the result is to allow a prisoner to challenge the duration of his confinement through a § 1983 action, in clear derogation of the rule of *Preiser*, *Heck*, and *Balisok*.

The Second Circuit's confidence that this would not occur because of the doctrine of judicial estoppel is misplaced. That doctrine is designed to prevent a litigant from making factual assertions in a legal proceeding where he has made contrary assertions in a prior proceeding. *See, e.g., All Terrain Properties v. Hoy*, 705 N.Y.S.2d 350 (App. Div. 2000); *see also Simon v. Safelite Glass Corp.*, 128 F.3d 68 (2d Cir. 1997). It is by no means clear that the state courts would consider that doctrine applicable in these circumstances, where the result might be violative of state policy.

The Second Circuit suggests that its novel rule is required to prevent prison officials from imposing trivial sanctions relating to duration of confinement in order to bar § 1983 challenges to conditions of confinement (App. 16a), but the court points to no examples of such a practice, and we are aware of none. In any event, the rule is an overbroad response to that concern; courts have ample power to craft rules to deal with perceived abuses and actions taken in bad faith. A speculative risk of abuse provides no reason to discard the entire regime of deference to state court determinations that affect the fact or duration of confinement.

Finally, the Second Circuit's decision has the potential to expand substantially the caseload of the federal courts. DOCS advises that in a recent 12-month period, there were 7,190 disciplinary proceedings that resulted in mixed sanctions. If the Second Circuit's new rule is permitted to stand, all the prisoners on whom these sanctions were imposed will now be permitted to challenge the validity of their disciplinary proceedings under § 1983. This Court should overturn the decision before a massive increase in filings inundates the federal courts of the Second Circuit and of any other circuit that may choose to follow the Second Circuit's rule.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED OCTOBER 17, 2006

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2005

(Submitted: June 19, 2006 Decided: October 17, 2006)

Docket No. 04-2822-pr

JOSE PERALTA,

*Plaintiff-Appellant,*

v.

SANDRA VASQUEZ, ROBERT A. JONES, DONALD SELSKY,

*Defendants-Appellees,*

ANITA R. FLORIO, GUY JAMES MANGANO, MARTIN H. BROWNSTEIN, JAMES EDWARD PELZER,

*Defendants.*

Before MINER, CALABRESI, *Circuit Judges*, HOLWELL, *District Judge.**

* The Honorable Richard J. Holwell, of the United States District Court for the Southern District of New York, sitting by designation.

*Appendix A*

Appeal from a judgment of the United States District Court for the Southern District of New York (Jones, *J.*) dismissing plaintiff's action under 42 U.S.C. § 1983 on the grounds that it was not cognizable under *Heck v. Humphrey*, 512 U.S. 477 (1994).

Vacated and Remanded

CALABRESI, Circuit Judge.

This appeal presents a new twist on a familiar issue: What requirements must a prisoner meet before he can maintain a claim under 42 U.S.C. § 1983 that challenges sanctions imposed pursuant to a prison disciplinary proceeding? The case law is clear that when a prisoner's challenge either to the process or the result of a prison disciplinary proceeding necessarily implies the invalidity of a sanction that affects the duration of his sentence, such as the deprivation of good-time credits, the prisoner may not maintain an action under § 1983 unless he has shown that the sanction (or the procedures that led to it, if the procedural defect at issue was critical to the imposition of the sanction) have been overturned through administrative channels or by a state or federal court. It is also clear that when a prisoner's challenge involves a sanction that affects only his conditions of confinement, this "favorable termination" requirement does not apply and a prisoner may maintain an action under § 1983 without showing that the sanction (or the procedures that led to it) have been previously invalidated.

What is not clear, however, is whether a prisoner who was subject to a single disciplinary proceeding that gave rise to two types of sanctions – one that affected the duration of his custody and the other that affected the conditions of his

confinement-can, without needing to satisfy the favorable termination rule, maintain a § 1983 action aimed solely at the second type of sanction. We now resolve this open question and hold that, in "mixed sanctions" cases, a prisoner can, without demonstrating that the challenged disciplinary proceedings or resulting punishments have been invalidated, proceed separately with a § 1983 action aimed at the sanctions or procedures that affected the conditions of his confinement. But we also hold that he may only bring such an action if he agrees to abandon forever any and all claims he has with respect to the sanctions that affected the length of his imprisonment.

## FACTS

On May 16, 1998, Jose Peralta, an inmate in the custody of New York State's Department of Correctional Services ("DOCS"), was accused of cutting another inmate several times with a "razor-type weapon." A disciplinary hearing was scheduled to adjudicate the matter. Defendant Sandra Vasquez, a corrections counselor with DOCS, was assigned to assist the appellant in the hearing. Defendant Brian Jones, the assistant superintendent at Fishkill Correctional Facility, where Peralta was being detained at the time of the incident, conducted the hearing on June 12, 1998. Jones found Peralta guilty and imposed a penalty of five years of confinement in the Special Housing Unit ("SHU"), five years loss of packages, commissary, and telephone privileges, and five years loss of good-time credits. The appellant appealed to Donald Selsky, the director of special housing/inmate disciplinary programs, who modified the penalty to twenty-four months of SHU confinement and a twenty-four month

loss of packages, commissary, and telephone privileges, in addition to a twenty-four month loss of good-time credits.

Having exhausted his appeals within the prison, Peralta filed an Article 78 petition challenging the decision in New York Supreme Court, *see* N.Y. C.P.L.R. § 7801 (Consol.2006), which transferred the case to the Appellate Division, Second Department. A judge of the Appellate Division granted Peralta "leave to file as a poor person" but declined to waive the filing fee. When Peralta failed to pay the filing fee, which he stated he could not afford, his case was dismissed. His appeal to the New York Court of Appeals of the decision dismissing his case was denied.

Peralta, proceeding pro se, then filed the instant action under 42 U.S.C. § 1983, alleging that the disciplinary hearing violated his constitutional rights. In his amended complaint, filed at the direction of the district court (Mukasey, *J.*), Peralta claimed that defendants Vasquēz, Jones, and Selsky denied him "adequate assistance, witnesses, and a fair and impartial hearing officer" and, in doing so, deprived him of substantive and procedural due process and protection against cruel and unusual punishment in violation of the Fourteenth and Eighth Amendments.[1] These defendants moved to dismiss the case on the ground that Peralta could not prevail on his § 1983 claim without first establishing that the disciplinary hearing or the resulting sanctions had been invalidated in a state or

1. Peralta also alleged in his amended complaint that judges and clerks of the Appellate Division, Second Department violated his constitutional rights. The district court dismissed the complaint against these defendants because they were immune. Peralta does not appeal this portion of the judgment.

federal proceeding, and that this had not occurred. In response, Peralta argued that, because he sought damages only for those sanctions affecting his conditions of confinement and not for the loss of his good-time credits, he could maintain his claim despite not having demonstrated that the sanctions or hearing had been invalidated.[2]

The district court (Jones, *J.*)[3] granted the defendants' motion. The district court acknowledged that, unlike many cases in which a prisoner challenges the result of prison disciplinary hearings through a § 1983 action, the plaintiff here sought damages only for his confinement in SHU-and not for the loss of good-time credits. It also noted that neither the Supreme Court nor this Court had "addressed the issue of whether a prisoner may proceed separately with his § 1983 claim as to those portions of his sentence which affected only the conditions of his confinement." Nevertheless, it found "that allowing a plaintiff to 'split' his claims under the circumstances in this action would be ill-advised." It therefore held that a prisoner-plaintiff who challenges only the conditions of confinement imposed pursuant to a disciplinary proceeding that also resulted in the loss of good-time credits must, like a plaintiff who challenges both types of sanctions, demonstrate that those sanctions or the

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2. He also argued that he was entitled to pursue his claim under § 1983 because he was not able to challenge the defendants' actions through a petition for habeas corpus.

3. The case was reassigned to Judge Barbara Jones on April 16, 2003.

disciplinary hearings giving rise to them have been invalidated before he can proceed with any § 1983 claim.[4]

## DISCUSSION

### I.

We review the district court's dismissal of the complaint de novo, and accept all material factual allegations therein as true. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 106 (2d Cir.2005).

### II.

This case implicates the overlap between 42 U.S.C. § 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254. The intersection of these two statutes, and the prerequisites for bringing a claim under each of them, has given rise to a series of cases in the Supreme Court and in this Court examining when a prisoner challenging the imposition of various types of punishment, and seeking different remedies, may rely on § 1983 to pursue relief.

In the initial case, *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the Supreme Court established that habeas is the exclusive remedy for a state

4. The district court also held that this Court's cases allowing a plaintiff to maintain an action under § 1983 when habeas relief is no longer available did not apply here because "[p]laintiff' s inability to pursue a habeas remedy is due to his own failure to properly pursue his state challenge to the disciplinary proceeding." Peralta does not challenge this portion of the judgment.

prisoner seeking an earlier release. There, state prisoners who had been deprived of good-time credits as a result of internal disciplinary proceedings brought an action under § 1983. They sought injunctive relief to compel the prison to restore those credits, and, as a result, gain them immediate release. *Id.* at 476, 93 S.Ct. 1827. The Court held that the prisoners could not maintain their action under § 1983 because when a prisoner is challenging "the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Id.* at 500, 93 S.Ct. 1827. Conversely, *Preiser* concluded that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." *Id.* at 499, 93 S.Ct. 1827.

Over twenty years later, in *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the Court considered when a prisoner, who sought money damages but not an earlier release for an allegedly unconstitutional conviction, could pursue a claim under § 1983. The prisoner-plaintiff in that case claimed that the county prosecutor and state police investigator had obtained his criminal conviction by engaging in unlawful acts. *Id.* at 478-79, 114 S.Ct. 2364. The Court held that Heck's § 1983 action was not cognizable because although on its face it sought only monetary damages, "the basis for the damages claim necessarily demonstrates the invalidity of the conviction. In that situation, [Heck] *can* be said to be 'attacking ... the fact or length of ... confinement,'...." *Id.* at 481-82, 114 S.Ct.

2364 (quoting *Preiser*, 411 U.S. at 490, 93 S.Ct. 1827) (alteration in original). Accordingly, it adopted what is known as the "favorable termination rule":

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.... Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

*Id.* at 486-87, 93 S.Ct. 1827 (internal citations omitted).

In a subsequent case, *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), the Court made clear that *Heck's* favorable termination rule applies to challenges made under § 1983 to procedures used in disciplinary proceedings that deprived a prisoner of good-time credits. In *Edwards*, the prisoner-plaintiff was found guilty of breaking prison rules at a hearing and sentenced to a mixed sanction of 10 days in isolation, 20 days in segregation, and the loss of 30 days of good-time credits. *Id.* at 643, 117 S.Ct. 1584. He then filed a § 1983 action that sought (1) a declaration that the procedures used in the disciplinary proceeding violated his Fourteenth Amendment due process rights, (2) damages for the allegedly unconstitutional procedures, and (3) an injunction to prevent future violations. In challenging only the procedures employed, the prisoner did not request the restoration of good-time credits or damages for the imposition of the sanctions affecting the conditions of his confinement. *Id.* at 644, 117 S.Ct. 1584.

The Court rejected the prisoner's argument that a distinction should be made between challenges to the procedures used in a disciplinary proceeding and challenges to the results of such a proceeding. It held that although the prisoner did not request that his good-time credits be restored, the claimed procedural defect (bias of the hearing officer), if established, would necessarily imply the invalidity of that punishment. A favorable outcome therefore would affect the length of his sentence, and, as a result, the prisoner's action was subject to *Heck's* favorable termination rule. *Id.* at 648, 117 S.Ct. 1584. The Court, however, "did not address whether the prisoner [subject to mixed sanctions] could proceed

separately with his § 1983 claim as to those portions of his sentence which affected only the conditions of his confinement." *Jenkins v. Haubert,* 179 F.3d 19, 25 (2d Cir.1999) (citing *Edwards,* 520 U.S. at 648, 117 S.Ct. 1584).

These cases, therefore, left open two questions: (a) whether *Heck's* favorable termination requirement applies to a § 1983 claim aimed at prison disciplinary proceedings that resulted only in sanctions which have no effect on the duration of confinement, and (b) if *Heck* does not, whether, where disciplinary proceedings result in sanctions that affect both the conditions of confinement as well as its duration, a prisoner can proceed separately with a § 1983 claim with respect to the parts of his punishment affecting only conditions of confinement.

In *Jenkins v. Haubert* we answered the first of these, concluding that *Heck* does not preclude a § 1983 claim aimed at sanctions that did not affect length of confinement. 179 F.3d at 21.[5] The prisoner-plaintiff in *Jenkins* was subject to two disciplinary hearings, each of which resulted in the sanction of thirty days in "keeplock."[6] *Id.* at 20-21. He alleged that the manner in which the proceeding he challenged was conducted violated his due process rights. In analyzing whether the prisoner's claim was cognizable under § 1983

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5. In doing so, we applied the dicta, to the same effect, in *Preiser. See Preiser,* 411 U.S. at 499, 93 S.Ct. 1827.

6. Keeplock is "a form of administrative segregation in which the inmate is confined to his cell, deprived of participation in normal prison routine, and denied contact with other inmates." *Jenkins,* 179 F.3d at 21 (internal citations and quotation marks omitted).

despite his failure to demonstrate that the proceeding had been invalidated, we noted that "the Court has never announced that the *Heck* rule bars a prisoner's challenge under § 1983 to an administrative or disciplinary sanction that does not affect the overall length of his confinement." *Id.* at 27. We held that because the prisoner's "suit is properly characterized as a challenge to the conditions of his confinement, rather than as a challenge to the fact or duration of his confinement, *Heck's* favorable termination requirement does not apply." *Id.* The Supreme Court subsequently adopted the same reasoning in *Muhammad v. Close,* 540 U.S. 749, 754, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004) (per curiam) (holding that *Heck's* favorable termination requirement does not apply to § 1983 actions challenging "prison disciplinary proceedings in the absence of any implication going to the fact or duration of [the] underlying sentence").

We conclude from all this that the purpose of the *Heck* favorable termination requirement is to prevent prisoners from using § 1983 to vitiate collaterally a judicial or administrative decision that affected the overall length of their confinement, and that punishments related to their term of imprisonment, or the procedures that led to them (if the procedural defect at issue was critical to the imposition of the punishment), must be attacked through a habeas petition. But the favorable termination requirement is *not* intended to compel a prisoner to demonstrate that a sanction he seeks to challenge, or the procedure that led to it, has been invalidated before he can proceed under § 1983 when that sanction does not affect his term of confinement. As the *Muhammad* Court explained, " *Heck's* requirement to resort to state litigation and federal habeas before § 1983 is not . . . implicated by a

prisoner's challenge that threatens no consequence for his conviction or the duration of his sentence. There is no need to preserve the habeas exhaustion rule and no impediment under *Heck* in such a case. . . ." *Muhammad,* 540 U.S. at 751-52, 124 S.Ct. 1303.

With that in mind, we turn to the merits of the second question posed above, whether and under what circumstances a prisoner may employ § 1983 in a mixed sanctions case to challenge the conditions rather than the terms of his confinement.

III.

Peralta seeks damages for the sanctions imposed on him which affected only the conditions of his confinement and, on that basis, he argues that his § 1983 action is cognizable, despite the fact that he has not demonstrated that the disciplinary hearing that gave rise to the alleged constitutional violation was overturned in a habeas or analogous proceeding. Whether a prisoner who was subject to a single disciplinary proceeding that gave rise to sanctions that affect both (a) the duration of his imprisonment and (b) the conditions of his confinement may, without satisfying the favorable termination requirement, maintain a § 1983 action aimed solely at the latter sanctions is an open question in the circuit. We today hold that a prisoner subject to such mixed sanctions can proceed separately, under § 1983, with a challenge to the sanctions affecting his conditions of confinement without satisfying the favorable termination rule, *but that he can only do so if he is willing to forgo once and for all any challenge to any sanctions that affect the*

*duration of his confinement.* In other words, the prisoner must abandon, not just now, but also in any future proceeding, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current § 1983 suit.

Both Supreme Court and circuit precedents clearly hold that a prisoner subject to a disciplinary proceeding that gives rise to sanctions that affect only the conditions of his confinement, and not the duration of his imprisonment, may maintain an action under § 1983 challenging those sanctions (or the procedures by which they were imposed) without satisfying *Heck's* favorable termination requirement. *Muhammad,* 540 U.S. at 754, 124 S.Ct. 1303; *Jenkins,* 179 F.3d at 27. Why then preclude a § 1983 action undertaken by a prisoner who was subject to a single disciplinary proceeding that gave rise to mixed sanctions but who seeks to challenge only those sanctions that affect the conditions of his confinement? The most-perhaps the only-plausible reason is that, if the prisoner prevails in his § 1983, conditions of confinement, action, he may, in a subsequent federal habeas petition or action brought in a state court challenging the duration of his confinement, seek to estop the state, collaterally, from defending the sanctions affecting length of imprisonment. Were that to happen, the validity of the duration of confinement would, in clear violation of *Heck,* have been decided in a § 1983 action.

If such a prisoner, however, as a prerequisite for maintaining his § 1983 action, both agrees to and can successfully abandon once and for all the duration claim, then his success in the § 1983 action would have *no* effect

on the sanctions that relate to the length of time he served in prison, and the concern animating the *Heck* favorable termination rule would simply not be implicated.[7]

Can we be sure that a prisoner's commitment to abandon any claim he has with respect to the sanctions that affect the duration of his confinement will be enforced in later proceedings? The doctrine of judicial estoppel provides us with that certainty. Judicial estoppel ensures, inter alia, that "abandonment of a claim to obtain a litigation advantage precludes the later reassertion of that claim." *United States v. Levasseur,* 846 F.2d 786, 799 (1st Cir.1988). In order for judicial estoppel to be invoked, (1) the party against whom it is asserted must have advanced an inconsistent position in a prior proceeding, and (2) the inconsistent position must have been adopted by the court in some matter. *Bates v. Long Island R.R.,* 997 F.2d 1028, 1038 (2d Cir.1993); *see also Mitchell v. Washingtonville Cent. Sch. Dist.,* 190 F.3d 1, 6 (2d Cir.1999).

Both elements of judicial estoppel would readily be satisfied should a prisoner-who was subject to mixed sanctions and who, having agreed to abandon forever his

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7. Allowing a party to abandon a claim that would otherwise prevent him from moving forward in federal court with the remainder of his action is not novel. Courts regularly permit a habeas petitioner who has a "mixed petition"-that is, one that involves both exhausted and unexhausted claims-to abandon his unexhausted claims so that he may proceed with his exhausted claims. *See Zarvela v. Artuz,* 254 F.3d 374, 378 (2d Cir.2001) (citing *Rose v. Lundy,* 455 U.S. 509, 519-20, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)); *see also McKethan v. Mantello,* 292 F.3d 119, 122 (2d Cir.2002).

duration claim, was allowed to proceed separately with his conditions of confinement claim under § 1983-subsequently, and in a separate proceeding, attempt to use the outcome of the § 1983 action to estop collaterally the state from defending the sanctions affecting length of his confinement.

Such a prisoner would manifestly have adopted, and proffered to the court, inconsistent positions in two separate proceedings. Moreover, under the rule articulated here, the court would only have allowed the prisoner to maintain his § 1983 action in the initial proceeding *because* the prisoner had agreed to forswear his claims related to the duration sanctions. As a result, the reliance requirement of judicial estoppel would certainly be met. In other words, at the time of the second proceeding, a prisoner who tried to renege on his abandonment of any duration suit would necessarily have satisfied both elements of judicial estoppel, and he would, therefore, be precluded from reasserting his previously abandoned challenge.

Given the efficacy and applicability of judicial estoppel, a prisoner who, on bringing a § 1983 suit challenging conditions of confinement, abandons any duration of imprisonment claims arising out of the same disciplinary process, is, substantively, in the precise condition of the prisoners who in *Muhammad* and *Jenkins* were allowed to bring § 1983 actions. His only surviving claim would be a § 1983 cognizable (conditions of confinement) suit. And the survival of that suit does not in any way implicate the concerns animating *Heck* and *Edwards;* the favorable termination rule, therefore, does not apply. *Cf. Sira v. Morton,* 380 F.3d 57, 67 (2d Cir.2004) (noting that "the Supreme

Court recently clarified [in *Muhammad* ] that a § 1983 action challenging the validity of a disciplinary sanction that does not affect the overall length of the prisoner's confinement may be brought regardless of whether the sanction was overturned"); *Jenkins,* 179 F.3d at 27. Accordingly, this type of § 1983 claim may proceed even if the prisoner-plaintiff has not shown that the sanctions or the procedures that led to them have been overturned through administrative channels or by a state or federal court.[8]

## CONCLUSION

The judgment of the district court is *Vacated* and *Remanded.* On remand, the district court is to ascertain whether Peralta has formally agreed, or is then willing, to waive all his potential claims with respect to the sanctions

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8. Not only does consistency with prior holdings require this result, but so also does the avoidance of unfortunate incentives. Were we to hold otherwise, we would give an undesirable incentive to prison officials, allowing them to place severe and unnecessary roadblocks in the way of prisoners who wish to challenge conditions of confinement. It is understandably difficult for a prisoner to prove "favorable termination" with respect to prison disciplinary proceedings. Accordingly, the rule advanced by the defendants, which, absent favorable termination, would ban a § 1983 action whenever a disciplinary proceeding resulted in the extension of confinement as well as a change in confinement conditions, would create the incentive to include as part of every instance of prisoner punishment a sanction that affected the duration of the prisoner's sentence-even if it would just be the loss of one day's worth of good-time credit. We do not believe that such an incentive furthers the twin goals of avoiding frivolous suits challenging conditions of confinement, while permitting potentially valid ones.

affecting the duration of his imprisonment arising out of the proceeding he is currently challenging. If such a waiver results, the district court must allow Peralta to proceed separately with his challenge under § 1983 to the sanctions affecting the conditions of his confinement.[9]

9. Before the district court considers the merits of that claim, however, it must permit the defendants to assert any of several affirmative defenses that could result in the dismissal of the plaintiff's claim, defenses which the defendants, for various reasons, may not have deemed necessary to proffer earlier. *See Jenkins,* 179 F.3d at 28-29.

## APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 26, 2004

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

01 Civ. 3171 (BSJ)

JOSE PERALTA,

Plaintiff,

v.

SANDRA VASQUEZ, et al.,

Defendants.

**MEMORANDUM ORDER**

**BARBARA S. JONES**
**UNITED STATES DISTRICT JUDGE**

Plaintiff pro se Jose Peralta brings this action pursuant to 42 U.S.C. § 1983, alleging that he was denied due process in a prison disciplinary proceeding that resulted in sanctions including five years confinement in the Special Housing Unit ("SHU"), five years loss of package, commissary and telephone privileges, and five years loss of good time credit. (Compl. ¶ 9).[1] This penalty was subsequently modified to

1. References to Plaintiff's First Amended Complaint, filed on or about June 11, 2001, are cited (Compl. ¶ __).

two years confinement in SHU and two years loss of privileges and good time credit. (Compl. ¶ 12). Plaintiff was incarcerated at Fishkill Correctional Facility during the time the alleged violation occurred.[2] Defendants move to dismiss because Plaintiff cannot show that his disciplinary proceedings were invalidated, as required by *Heck v. Humphrey*, 512 U.S. 477 (1994). The Court agrees and GRANTS Defendants' motion to dismiss.

> In order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

*Heck*, 512 U.S. 486-87. In *Preisser v. Rodriguez*, 411 U.S. 475 (1973), the Supreme Court held that a prisoner must seek habeas corpus relief under 28 U.S.C. § 2254 in order to challenge a prison disciplinary proceeding that resulted in the loss of good time credits. Although *Preisser* was limited to equitable relief, *Edwards v. Balisok*, 520 U.S. 641 (1997), extended *Preisser*, holding that a state prisoner may not bring

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2. As Plaintiff is no longer housed at Fishkill Correctional Facility, his claims for injunctive relief are dismissed as moot. *Prins v. Coughlin*, 76 F.3d 504, 506 (2d Cir. 1996).

a § 1983 claim for damages if that claim challenges the validity of the procedures used to deprive him of good time credits unless the disciplinary disposition has already been reversed through a state administrative or judicial proceeding or a habeas proceeding. *Edwards*, 520 U.S. at 645. In other words, *Edwards* extended the *Heck* Rule to claims for damages that implicated the fact or duration of confinement.

Plaintiff contends that he may nonetheless maintain this action because he seeks damages only for his confinement in SHU not the loss of good time credits. Courts in this district have interpreted *Edwards* to prohibit claims for damages under § 1983 where the plaintiff has suffered both a loss of good time credit as well as condition of confinement sanctions – such as confinement in SHU – unless the proceeding has otherwise been invalidated. Even where the plaintiff seeks damages based only on his conditions of confinement, the *Heck* Rule applies because where the loss of good time credit and another sanction are part of the same sentence imposed after plaintiff is found guilty of a single charge, a finding of a significant procedural defect, such as a denial due process during the hearing, would indicate not only that the non-good time credit sanction was the result of a tainted proceeding, but that the deprivation of good-time credit was similarly invalid. *Gomez v. Kaplan*, 2000 U.S. Dist. LEXIS 14239, at *22 (S.D.N.Y. Sept. 29, 2000); *see also McNair v. Jones*, 2002 U.S. Dist. LEXIS 17409, at *36-38 (Sept. 18, 2002).

Although a prisoner may maintain a § 1983 action for a due process violation resulting in condition of confinement sanctions that have no effect on the duration of the prisoner's

overall confinement but rather may be characterized as conditions of confinement, *Jenkins v. Haubert*, 179 F.3d 19, 21 (2d Cir. 1999), Plaintiff argues that he may "split" these claims and pursue a § 1983 action even though the challenged proceeding also resulted in a deprivation of good time credits. Although neither the *Edwards* Court nor the Second Circuit in *Jenkins v. Haubert* addressed the issue of whether a prisoner may proceed separately with his § 1983 claim as to those portions of his sentence which affected only the conditions of his confinement. *Jenkins*, 179 F.3d at 25, this Court finds that allowing a plaintiff to "split" his claims under the circumstances in this action would be ill-advised. *See Gomez v. Kaplan*, 2000 U.S. Dist. LEXIS 14239, at *23-24. Here, the alleged due process violations that Plaintiff seeks to challenge – including, *inter alia*, that the hearing officer's decision was based on impermissible hearsay and that Plaintiff received inadequate assistance in preparing for the disciplinary proceeding from his assigned "Spanish Speaking Tier Assistant" (Compl. ¶¶ 3-6) – would, if proven, necessarily imply the invalidity of the deprivation of his good-time credits," as well as his confinement in SHU. *Edwards v. Balisok*, 520 U.S. 641, 646 (1997).

Plaintiff does not allege that his disciplinary disposition has already been reversed through a state administrative or judicial proceeding or a habeas proceeding. Plaintiff filed an Article 78 petition, challenging the disciplinary proceeding; however, that petition was dismissed because Plaintiff failed to pay a mandatory $200.00 state filing fee.

Plaintiff's subsequent appeal to the New York State Court of Appeals was denied.[3] (Compl. ¶¶ 13-19). Plaintiff did not file a petition for a writ of habeas corpus, nor does it appear that such a petition would succeed.

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

*Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Although the Second Circuit has recognized limited exceptions to the *Heck* Rule – for example, allowing a plaintiff to bring a § 1983 action for false imprisonment even if habeas relief is no longer available because the plaintiff has been released from custody, *see Huang v. Johnson*, 251 F.3d 65 (2d Cir. 2001) – here, Plaintiff's inability to pursue a habeas remedy is due to his own failure to properly pursue his state challenge to the disciplinary proceedings; specifically, Plaintiff failed to pay the required filing fee in

3. Plaintiff originally named several state court judges and personnel in this action, presumably for their failure to waive the mandatory filing fee after Plantiff was granted leave to proceed in forma pauperis. (Compl. ¶¶ 14-19, 21). The claims against those defendants were dismissed in an order dated December 10, 2002, on the grounds of immunity.

state court. Under these circumstances, the Court will not permit him now to bring a claim pursuant to § 1983 without having invalidated the underlying disciplinary proceeding. *Cf. O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999) ("we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts"). To permit otherwise, would create a loophole to the *Heck* Rule for plaintiffs who willfully default in their state challenges to the underlying disciplinary proceeding.

Defendants' motion to dismiss is GRANTED, and the Clerk of the Court is directed to close this case.

SO ORDERED:

s/ Barbara S. Jones
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
April 26, 2004

## APPENDIX C — ORDER OF PARTIAL DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED DECEMBER 10, 2002

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

01 Civ. 3171 (MBM)

JOSE PERALTA,

Plaintiff,

-against-

GLENN S. GOORD, Commissioner DOCS; WYANYE STRACK, Superintendent Fishkill Correctional Facility; ADSP R. JONES, Fishkill Correctional Facility,

Defendants.

**ORDER OF PARTIAL DISMISSAL**

By Order dated April 16, 2001, plaintiff, appearing *pro se,* was directed to file an amended complaint with this Court within sixty (60) days to detail his claim that his right to due process was violated at his prison disciplinary hearing. Plaintiff filed an amended complaint[1] on June 11, 2001 as

1. In the Amended Complaint, plaintiff names as defendants: **Sandra Vasquez**, Correction Counselor; **Robert A. Jones**, Assistant Deputy Superintendent of Programs Services; **Donald Selsky**, (Cont'd)

directed, however, because plaintiff seeks to pursue claims against parties who are immune from such suit, I dismiss part of this amended complaint for the following reasons.

Judges have absolute immunity from suit for judicial acts performed in their judicial capacities. *Mireles v. Waco,* 502 U.S. 9, 11 (1991) *(per curiam)* ("judicial immunity is an immunity from suit, not just from the ultimate assessment of damages." *Id.* (citation omitted)); see *Stump v. Sparkman,* 435 U.S. 349, 356 (1978); *Pierson v. Ray,* 386 U.S. 547, 553-55 (1967); *Tucker v. Outwater,* 118 F.3d 930 (2d Cir. 1997), *cert. denied,* 522 U.S 997 (1997); *Oliva v. Heller,* 839 F.2d 37 (2d Cir. 1988); see also *Forrester v. White,* 484 U.S. 219, 225 (1988). This absolute "judicial immunity is not overcome by allegations of bad faith or malice," *Mireles,* 502 U.S. at 11, nor can a judge "be deprived of immunity because the action he took was in error . . . or was in excess of his authority," *id.* at 13 (quoting *Stump,* 435 U.S. at 356). As the alleged wrongdoings of defendants Florio and Mangano were acts performed in a judicial capacity, plaintiff's claims are foreclosed by absolute immunity and are subject to dismissal. *See* 28 U.S.C. § 1915(e)(2)(B)(iii).

Plaintiff's allegations that defendants Brownstein and Pelzer, the former and current Clerk of Court of the New

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(Cont'd)

Director, Special Housing/Inmate Disciplinary Programs; **Anita R. Florio**, Judge of the Appellate Division, Second Department; **Guy James Mangano**, Judge of the Appellate Division, Second Department; **Martin H. Brownstein**, Former Court Clerk; **James Edward Pelzer**, Court Clerk of Appellate Division, Second Department.

*Appendix C*

York Supreme Court, Appellate Division, Second Department, required that he pay a filing fee for his action in state court, failed to give him the court file in his case on June 29th and refused to let him speak to the prosecution before his criminal case was called on June 30th must be dismissed because court clerks are absolutely immune for conduct which is judicial in nature and an integral part of the judicial process. See *Rodriguez v. Weprin,* 116 F.3d 62, 66 (2d Cir. 1997) (court clerks are absolutely immune from claims arising out of failure to properly manage court calendar). Since "[a] court's inherent power to control its docket is part of its function of resolving disputes between parties,'" as is its inherent power to control order in the courtroom, defendant Smutt assumes the absolute immunity afforded to judicial officers. *Kampfer v. Rodriguez,* No. 97-CV-739 (RSP/DNH), 1998 WL 187364, at *2 (N.D.N.Y. Apr. 15, 1998) (quoting *Rodriguez,* 116 F.3d at 66); see *McGann v. Lange,* No. 96-CV-859 (SJ), 1996 WL 586798, at *2 (E.D.N.Y. Oct. 10, 1996) (ministerial acts which are "integral to the judicial process'" are protected by absolute immunity). The complaint as it pertains to these two defendants must therefore be dismissed. 28 U.S.C. § 1915(e)(2)(B)(iii).

Accordingly, this action, filed *in forma pauperis* under 28 U.S.C. § 1915(a)(1), is dismissed as to defendant Florio, Mangano, Brownstein, and Pelzer because it "seeks monetary relief against a defendant who is immune from such relief.". 28 U.S.C. § 1915(e)(2)(B)(iii). In light of plaintiff's remaining allegations, I direct the Acting Clerk of Court to reassign this action as it pertains to the remaining defendants to a district judge in accordance with the Rules for the Division of Business Among District Judges. A copy of this

*Appendix C*

Order shall be served with the summons and amended complaint. Nothing herein shall preclude the remaining parties from making any such motion to dismiss the complaint as they may be advised to make. The Acting Clerk of Court is directed to designate this action as a Local Rule 33.2 case and advise the parties that any discovery in this action shall be conducted in accordance with Local Rule 33.2. The *Pro Se* Office is directed to provide plaintiff with copies of the standard discovery requests for service upon defendants. I certify pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States,* 369 U.S. 438, 444-45 (1962).

SO ORDERED

s/ Michael B. Mukasey
MICHAEL B. MUKASEY
Chief Judge

Dated: DEC 10 2002
New York, New York

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 27, 2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Thomas Asreen
ACTING CLERK

Date:

| | |
|---|---|
| Docket Number: | 04-2822-Pr |
| Short Title: | Peralta v. Vasquez |
| DC Docket Number: | 01-cv-3171 |
| DC: | SDNY (NEW YORK CITY) |
| DC Judge: | Honorable Barbara Jones |

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 27th day of December two thousand six.

*Appendix D*

Jose Peralta,

Plaintiff-Appellant,

v.

Sandra Vasquez, Corrections Counselor, Robert Jones, Assistant Deputy Superintendent of Program Services, Donald Selsky, Director, Special Housing/Inmate Disciplinary Programs,

Defendant-Appellee,

Glen S. Goord, DOCS, Wayne Strack, Fishkill Correctional Facility, R. Jones, Assistant Deputy Superintendent of Program Services, Anita R. Florio, Judge of the Appellate Division, Second Department, Guy James Mangano, Judge of the Appellate Division, Second Department, Martin H. Brownstein, Former Court Clerk, James Pelzer, Court Clerk of Appellate Division, Second Department,

Defendants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by counsel for the appellees Nancy A. Spiegel. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

*Appendix D*

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen, Acting Clerk

By: s/ [illegible]
Motion Staff Attorney

# OPPOSITION BRIEF

(2)

FILED
MAY 30 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1307

# In the Supreme Court of the United States

ROBERT A. JONES, Assistant Deputy Superintendent of Program Services, and DONALD SELSKY, Director, Special Housing/Inmate Disciplinary Programs,
*Petitioners*,

v.

JOSE PERALTA

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and its progeny bar a suit under 42 U.S.C. § 1983 challenging a prison disciplinary proceeding that resulted in both a loss of good time credits and a change in the conditions of confinement if the prisoner expressly executes an enforceable waiver of any and all claims that would affect the fact or duration of his confinement.

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## COUNTERSTATEMENT OF THE CASE

In this case, respondent was subject to a prison disciplinary proceeding that resulted in the imposition of sanctions that affected both the length and the conditions of his confinement. New York state courts dismissed respondent's due process challenge to the disciplinary proceeding, evidently for failure to pay a filing fee. Respondent then brought this suit in federal court under 42 U.S.C. § 1983, seeking damages for the change in the conditions of his confinement. Relying on *Heck* v. *Humphrey*, 512 U.S. 477 (1994), petitioners moved to dismiss the claim, arguing that success on the merits necessarily would lead to a reduction in respondent's sentence. The Second Circuit rejected petitioners' argument, holding that respondent may proceed with his suit if he is willing to waive all current and future challenges to the duration of his confinement. The Second Circuit remanded the case for a determination whether respondent would agree to such a waiver and, if so, to structure an appropriate waiver.

This case does not warrant review. There is no conflict in the circuits; in fact, the Second Circuit is the *only* court to have addressed the question whether the *Heck* doctrine precludes a Section 1983 suit by a prisoner who waives any challenge to the fact or length of confinement. Moreover, the Second Circuit's answer to that question was correct: this Court's decisions applying the *Heck* principle, including recent precedent that was faithfully applied by the court below, establish that *Heck*'s preclusive rule has no effect when the prisoner's suit will not necessarily affect the length of confinement. That certainly is the situation in a case where, as the Second Circuit contemplated here, the prisoner irrevocably and enforceably disclaims any challenge to his or her sentence. And compelling prudential concerns – including the interlocutory nature of the proceeding, uncertainty about whether a waiver will in fact be executed on remand (and, if it is, what it will say), and material ambiguities in the record – make this case an unsuitable vehicle with which to review

the question presented. The petition therefore should be denied.

***1. Prison Disciplinary Proceedings.*** In 1998, respondent was accused of conspiring to injure another inmate at Fishkill Correctional Facility. Following a brief, one-hour proceeding, respondent was found guilty of violating prison rules. Pet. App. 18a. Respondent maintains that prior to and during his disciplinary hearing, he was prevented from obtaining or reviewing a range of key evidence – including logs that would have demonstrated that he was not at the location alleged during the event in question – and that he was denied an impartial hearing. Resp. App. 3a-5a, 18a-20a.[1] Respondent also states that he was prevented from confronting some of the important evidence against him. *Id.* at 5a.

At the conclusion of the hearing, respondent was sentenced to five years of lost good time credit and five years each of segregated housing, lost packages privileges, lost commissary privileges, and lost phone privileges. Pet. App. 18a. Respondent filed a timely administrative appeal. Without opinion or explanation, the appeal board reduced respondent's sentence to two years of lost good time credit and two years of segregated housing, lost packages privileges, lost commissary privileges, and lost phone privileges. *Id.* at 18a-19a.

***2. State Court Proceedings.*** In October 1998, respondent filed an Article 78 petition and motion for an order to show cause in the New York Supreme Court for Dutchess County against prison officials at the Fishkill Correctional Facility. Actions taken by agencies and officers of state and local government in New York – including prison proceedings – are properly challenged in state court through Article 78 petitions. N.Y. C.P.L.R. §§ 7801 & 7803 (McKinney 1998). The motion for an order to show cause averred that

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[1] "Resp. App." refers to the appendix to this brief.

respondent had been denied due process of law. Specifically, respondent claimed that a prison counselor that was assigned to assist with his defense failed to provide him with requested evidence that was necessary for his defense; he also alleged that petitioner Jones, who served as the hearing officer, was unfair and partial in conducting the hearing.

The record does not clearly indicate how the case proceeded in state court after respondent filed his motion to show cause and an accompanying motion to proceed as a poor person.[2] According to the allegations in respondent's federal complaint, which must be accepted as true at this point in the proceeding, the state trial court granted respondent's motion to proceed as a poor person, but then declined to waive the filing fee, Resp. App. 6a, and dismissed the case for failure to perfect.[3] Soon thereafter, the state supreme court transferred the case to the Appellate Division, Second Department. *Ibid.* It appears that in June 1999, respondent filed another motion to proceed as a poor person during his appeal. *Id.* at 25a. Nevertheless, on February 15, 2000, the

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[2] So far as we have been able to determine, respondent's original Article 78 file has been lost by the New York court system. Hence many of the facts and dates relating to the state court suit are unverifiable. The Dutchess County clerk's office informs us that respondent's file was never returned to it following respondent's original transfer of the case to the Appellate Division. The clerk's office for the Appellate Division, Second Department, reports that it transferred the file back to Dutchess County. Neither office has been able to locate the file, although the Dutchess County clerk's office has provided a copy of the order dismissing respondent's case, along with several hundred others.

[3] Although respondent alleges that the fee was $250, Resp. App. 6a, New York law in effect at the time that respondent filed his Article 78 action indicates the fee was actually $165. See 1990 N.Y. Sess. Laws ch. 190, § 260 (McKinney). The district court, however, stated that the fee was $200. Pet. App. 21a.

Appellate Division again dismissed the case for failure to perfect. Respondent next appealed to the New York Court of Appeals; according to the Dutchess County clerk's office, that court dismissed the case for failure to perfect shortly thereafter. According to the complaint, respondent was never given an opportunity to proceed with his Article 78 motion without paying the filing fee.

*3. Federal Court Proceedings.* Having been foreclosed from pursuing his constitutional claims in state court, in November 2000 respondent filed a complaint under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York. Pet. 1. Pursuant to an order of the district court dated April 16, 2001, respondent filed an amended complaint on June 11, 2001. Pet. App. 24a.

In his amended complaint, respondent alleged with respect to his disciplinary hearing that (1) the prison counselor provided inadequate assistance by refusing to procure certain evidence for respondent's defense; (2) petitioner Jones, the hearing officer, had been biased, unfair, and partial throughout the disciplinary proceeding; and (3) on appeal, petitioner Selsky, the director of inmate disciplinary programs who issued the final determination, decided that respondent was innocent but, rather than expunging his record as required by law, merely reduced respondent's sentence. Resp. App. 6a.[4]

Petitioners moved to dismiss, arguing that the entire complaint was barred by *Heck*. Pet. App. 4a-5a. Respondent opposed the motion, maintaining that he should be allowed to proceed because he was not seeking damages for the loss of

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[4] Respondent further alleged that his Article 78 state court proceeding was deficient and brought a claim against certain judges and court clerks, arguing that they denied him access to the New York state court system. Resp. App. 6a-7a. The district court dismissed these claims on immunity grounds. Pet. App. 24a-27a. Respondent did not appeal this dismissal to the Second Circuit. *Id.* at 4a n.1.

good time, but only for the restrictive confinement. Pet. App. 5a, 20a. The district court dismissed the complaint. *Id.* at 18a-23a.

The court of appeals reversed. Pet. App. 1a-17a. Relying on its prior decision in *Jenkins* v. *Haubert*, 179 F.3d 19, 21 (2d Cir. 1999), the court first concluded that "*Heck* does not preclude a [Section] 1983 claim aimed at sanctions that did not affect the length of confinement." Pet. App. 10a. The court explained:

> We conclude * * * that the purpose of the Heck favorable termination requirement is to prevent prisoners from using [Section] 1983 to vitiate collaterally a judicial or administrative decision that affected the overall length of their confinement, and that punishments related to their term of imprisonment, or the procedures that led to them (if the procedural defect at issue was critical to the imposition of the punishment), must be attacked through a habeas petition. But the favorable termination requirement is not intended to compel a prisoner to demonstrate that a sanction he seeks to challenge, or the procedure that led to it, has been invalidated before he can proceed under [Section] 1983 when that sanction does not affect his term of confinement.

Pet. App. 11a.

Under this principle, the court concluded, a prisoner may challenge the constitutionality of proceedings that lead to "mixed sanctions" – those affecting both the length and conditions of confinement – only if the prisoner permanently waives *all* challenges to the length of confinement:

> We today hold that a prisoner subject to such mixed sanctions can proceed separately, under [Section] 1983, with a challenge to the sanctions affecting his conditions of confinement without satisfying the favorable termination rule, *but that he can only do so*

> *if he is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement.* In other words, the prisoner must abandon, not just now, but also in any future proceeding, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current [Section] 1983 suit.

Pet. App. 12a-13a (emphasis in original). The court added that such a waiver would be enforceable as a matter of judicial estoppel if a prisoner who chose to forgo a challenge to the length of confinement subsequently sought to renege on his abandonment of the claim. *Id.* at 14a-15a.

The Second Circuit remanded the case to the district court to determine whether respondent would formally agree to waive all claims relating to the length of confinement. The court subsequently denied a petition for rehearing or rehearing en banc without dissent. Pet. App. 28a-30a.

## REASONS FOR DENYING THE PETITION

This case presents neither a question warranting review nor – to the extent that the question presented is thought to merit consideration – an appropriate vehicle for addressing it. Notwithstanding petitioners' assertion of a conflict in the circuits, only the Second Circuit has addressed the question presented here: whether a prisoner may pursue a Section 1983 claim for damages arising from the conditions of his imprisonment if he irrevocably waives any claims with respect to the length of his confinement. Moreover, the decisions relied upon by petitioners to support the supposed conflict all predate this Court's most recent clarifications of the relevant legal rules, which make clear that the Second Circuit's decision is fully in line with this Court's precedent. See *Wilkinson* v. *Dotson*, 544 U.S. 74 (2005); *Muhammad* v. *Close*, 540 U.S. 749 (2004). If there is any doubt on this point, the Court

should await further consideration of the issue by the lower courts before itself confronting the question presented.

Finally, the fact that litigation is ongoing in the instant case provides a prudential basis for denial of the petition for certiorari. In the first place, the case may become moot after remand; it is possible, for example, that respondent ultimately will choose not to disclaim a challenge to the length of his confinement, which would preclude pursuit of his Section 1983 claim at this time. Moreover, the case may be mooted by settlement or a disposition on other grounds. Additionally, because no waiver has yet been executed in this case, the Court would be unable to review the adequacy of the waiver's terms or the relevance of particular terms to application of the *Heck* doctrine. Denial of the petition is therefore plainly warranted.

## I. THERE IS NO CIRCUIT CONFLICT ON THE QUESTION PRESENTED.

1. The Second Circuit is the first and, thus far, the only court to set out a procedure applying the principle that follows directly from this Court's precedent: a prisoner may pursue a Section 1983 claim for damages arising from the conditions of his imprisonment if he "forever [abandons] any and all claims he has with respect to the sanctions that affected the length of his imprisonment." Pet. App. 3a. In arguing to the contrary, petitioners cite only three decisions issued over the span of thirteen years since this Court decided *Heck*, each of which predates this Court's two most recent relevant cases, *Wilkinson* and *Muhammad*. See Pet. 8-10, citing *Post* v. *Gilmore*, 111 F.3d 556 (7th Cir. 1997) (per curiam); *Sheldon* v. *Hundley*, 83 F.3d 231 (8th Cir. 1996); *Gotcher* v. *Wood*, 66 F.3d 1097 (9th Cir. 1995), *vacated and remanded*, 520 U.S. 1238 (1997), *on remand*, 122 F.3d 39 (9th Cir. 1997). But none of these decisions addresses the question presented in this case: whether *Heck* bars a prisoner from using Section 1983 to seek damages with respect to the

conditions of his confinement when resolution of the Section 1983 action will have *no* effect on the duration of confinement because the prisoner has expressly and enforceably waived any claim relating to the length of his sentence.

In *Sheldon* v. *Hundley*, for instance, prison officials charged the defendant with verbal abuse. Sheldon filed a Section 1983 suit seeking money damages for both the loss of good time credits and a change in the conditions of his confinement. The Eighth Circuit dismissed his Section 1983 claim and required him to pursue a habeas remedy. The court explained that if "success on the merits of *a particular* [Section] 1983 claim would *necessarily* imply the invalidity of a disciplinary result lengthening the plaintiff's prison sentence, *Heck* requires favorable termination of the action in an authorized state tribunal or a federal habeas court, even if the claim is for damages rather than earlier release." 83 F.3d at 233 (emphasis added). At no point, however, did the *Sheldon* court consider, let alone decide, whether the plaintiff could have pursued a Section 1983 action for damages with respect *only* to the conditions of his confinement if he had executed an enforceable waiver of his right to pursue a reversal of the denial of his good time credits.

Petitioners also mistakenly claim that two decisions of the Seventh Circuit conflict with the decision below. In *Post* v. *Gilmore*, the Seventh Circuit considered a situation in which plaintiff Post lost good time credits and was subjected to solitary confinement following a prison disciplinary determination. Post filed both a habeas petition with respect to his lost good time credits and a Section 1983 complaint with respect to his solitary confinement. Relying on *Heck*, the court concluded that the two suits must be "adjudicated in sequence – and the sequence should begin with the [Section] 2254 claim." 111 F.3d at 557. The court never considered whether Post could have proceeded with his Section 1983 suit if he had agreed to seek only damages and to abandon his habeas proceeding, waiving "forever any and all claims he

has with respect to the sanctions that affected the length of his imprisonment." Pet. App. 3a. See also *Montgomery* v. *Anderson*, 262 F.3d 641 (7th Cir. 2001) (holding that a prisoner must pursue habeas relief before Section 1983 damages, without considering whether the plaintiff could have proceeded with his Section 1983 suit if he waived relief for his lost good time credits).

Finally, petitioners inaccurately claim that the Ninth Circuit's opinion in *Gotcher* v. *Wood* conflicts with the decision below. In the initial proceedings in that case, the plaintiff brought a Section 1983 claim seeking damages both for the loss of good time credits and for a change in the conditions of his confinement. The Ninth Circuit first held that the plaintiff could pursue his Section 1983 suit as filed. 66 F.3d 1097 (9th Cir. 1995). Washington State filed a petition for certiorari, and this Court summarily vacated and remanded the case for reconsideration in light of *Edwards* v. *Balisok*, 520 U.S. 641 (1997). *Wood* v. *Gotcher*, 520 U.S. 1238 (1997). On remand, the Ninth Circuit summarily concluded "that *Edwards* forecloses Gotcher's entire compensatory claim under 42 U.S.C. § 1983." 122 F.3d at 39. But like the Seventh and Eighth Circuits, the Ninth Circuit never considered or addressed the question presented in this case: whether the plaintiff could have pursued his Section 1983 claim for damages arising *only* from the conditions of his imprisonment if he had permanently abandoned *all* claims relating to the sanction that affected the length of confinement.

2. Because only the Second Circuit has addressed the question presented here, this Court should await further consideration of the issue by the lower courts before itself confronting the question. Members of the Court have often noted that it is "desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting denial of certiorari). Allowing the lower courts "'to serve as labora-

tories in which the issue receives further study before it is addressed by this Court'" will increase "the likelihood that the issue will be resolved correctly." *Brown* v. *Texas*, 522 U.S. 940 (1997) (Stevens, J., respecting denial of certiorari, joined by Souter, Ginsberg, and Breyer, JJ.) (quoting *McCray* v. *New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari, joined by Blackmun and Powell, JJ.)). That is especially so in this case, because additional experience could cast considerable light on several significant, unresolved issues related to the Second Circuit's holding, including questions as to the scope and enforceability of the proposed waivers and the willingness of prisoners actually to exercise the waiver option.

The importance of percolation in the instant case is accentuated by the fact that the opinions of the Seventh, Eighth, and Ninth Circuits upon which petitioners rely all predate this Court's most recent rulings on the interplay between habeas review and Section 1983. Notably, the Second Circuit relied extensively on *Muhammad* v. *Close*: "As the *Muhammad* Court explained, '*Heck*'s requirement to resort to state litigation and federal habeas before [Section] 1983 is not * * * implicated by a prisoner's challenge that *threatens no consequence for his conviction or the duration of his sentence*. There is no need to preserve the habeas exhaustion rule and no impediment under *Heck* in such a case * * *.'" Pet. App. 11a-12a (emphasis added; alterations in original; quoting *Muhammad*, 540 U.S. at 751-52). Moreover, in *Wilkinson* v. *Dotson*, the Court further explained that when "victory for the prisoners [does not] *necessarily* [mean] immediate release or a shorter period of incarceration," *Heck* is no bar to a Section 1983 suit. *Wilkinson*, 544 U.S. at 80 (emphasis added).

Because all three allegedly conflicting decisions predate this Court's holdings in *Wilkinson* and *Muhammad*, they could not have taken into account either the full range of this Court's relevant precedent or the Second Circuit's own anal-

ysis relying on that precedent. And it surely would be useful for the Court to have the views of other courts of appeals on the question whether – as plainly seems to be the case – this Court's more recent holdings support the approach taken below. Further percolation of the question presented, in light of *Wilkinson* and *Muhammad*, is therefore appropriate.

## II. THE DECISION BELOW PROPERLY APPLIES THIS COURT'S PRECEDENT.

Not only have no other courts squarely addressed the question presented, but the Second Circuit's approach to "mixed sanctions" cases fully accords with this Court's *Heck* jurisprudence. When a prison disciplinary proceeding affects both length and conditions of confinement, the decision below allows Section 1983 suits to proceed only when the prisoner irrevocably waives his or her right to pursue any and all challenges to the sanctions affecting the length of confinement. Pet. App. 12a-13a. Under the Second Circuit's rule, a prisoner who agrees to such a waiver is not only precluded from challenging the length of confinement through Section 1983, but is also barred from pursuing a subsequent similar claim through state or federal habeas. Because the Second Circuit prohibits Section 1983 suits from affecting length of confinement, its approach is consistent with *Heck* and its progeny. Contrary to petitioners' claim, moreover, such waivers of claims are frequently employed in litigation generally and prison litigation specifically, and present no danger to prison safety or the administration of justice.

1. It is settled that if a plaintiff's success in a Section 1983 suit "would necessarily imply the invalidity of his conviction or sentence," the plaintiff first "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. At the same time, the Court

has made clear that, if a Section 1983 suit will not affect the length of a prisoner's confinement, the action may proceed. *Ibid.* And as the Court has clarified recently, if success in a Section 1983 suit would not "necessarily spell speedier release," the claim does not "lie[] at 'the core of habeas corpus'" and is not barred by *Heck*. *Wilkinson*, 544 U.S. at 82 (quoting *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973)). "*Heck*'s requirement to resort to state litigation and federal habeas before [Section] 1983 is not * * * implicated by a prisoner's challenge that *threatens no consequence* for his conviction or duration of his sentence." *Muhammad*, 540 U.S. at 751 (emphasis added).

This conclusion flows from this Court's decision in *Edwards* v. *Balisok*: "[T]he Court [in *Balisok*] held the prisoner's suit *Heck*-barred not because it sought nullification of the disciplinary procedures but rather because nullification of the disciplinary procedures would lead *necessarily* to restoration of good-time credits and hence the shortening of the prisoner's sentence." *Wilkinson*, 544 U.S. at 84 (emphasis added). Under the Second Circuit's waiver rule, a plaintiff proceeding with a Section 1983 claim in a "mixed sanctions" case would, by force of his waiver, necessarily *not* threaten any consequence to those sanctions affecting the fact or duration of his confinement.

Petitioners' selective reading of *Wilkinson* distorts the meaning of this Court's line of precedent following *Heck*. Ignoring the core holding of *Wilkinson* that "[Section] 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the prisoner," 544 U.S. at 81 (emphasis in original), petitioners contend that the Court should be concerned with what a plaintiff's claims "would, if accepted, demonstrate." Pet. 12. But *Wilkinson* clearly expresses a concern, not for what success on a Section 1983 claim might "demonstrate" in the abstract, but for whether success would grant relief "where a state prisoner requests present or future re-

lease." 544 U.S. at 81. In *Wilkinson*, the challenge to state parole procedures was cognizable under Section 1983 because, given the discretionary nature of parole decisions, success in the suit would "not mean immediate release from confinement or a shorter stay in prison * * *." *Id.* at 82. That is, because a challenge to the parole system would not "necessarily spell speedier release," the claim did not "lie[] at 'the core of habeas corpus.'" *Ibid.* (quoting *Preiser*, 411 U.S. at 489).

Likewise, in *Muhammad* v. *Close*, the Court allowed a prisoner to seek damages for special detention that was imposed prior to his disciplinary proceeding. Because the prisoner had been acquitted of the charge that led to his special detention, the Court reasoned that the Section 1983 suit could proceed because it "threaten[ed] no consequence for his conviction or duration of his sentence." 540 U.S. at 751.[5] Once again, the Court's concern in *Muhammad* was for the practical consequences of success on the merits in the Section 1983 action.

Insofar as it has no consequence for the fact or duration of respondent's confinement, the Second Circuit's holding in the instant case thus conforms with this Court's precedent. To challenge a prison proceeding that results in a mixed outcome affecting both length and conditions of confinement, "the prisoner must abandon, not just for now, but also in any future proceedings, any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current [Section] 1983 suit." Pet. App. 13a. Once the prisoner has permanently waived any challenge to the length of his or her confinement, success on the claims raised in the Section 1983 suit would have no

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[5] In *Muhammad*, the Court noted specifically that the prisoner had amended his complaint to omit claims that the state argued implicated habeas-type relief, 540 U.S. at 753, which is consistent with the Second Circuit's waiver approach here.

bearing on the fact or length of his or her confinement. Like the plaintiff in *Wilkinson*, respondent does not "seek[] an injunction ordering his immediate or speedier release into the community." *Wilkinson*, 544 U.S. at 82.

This Court's holdings from *Heck* through *Wilkinson* thus focus on the practical effects of a Section 1983 suit. Where success in the suit would necessarily alter the length of confinement, a suit is barred by *Heck*. When a prisoner waives any and all challenges to an extension of the length of confinement resulting from a prison disciplinary proceeding, *Heck* is not implicated. The Second Circuit therefore properly applied this Court's precedent.

2. There is nothing novel in the Second Circuit's analysis: it follows from the practice, long accepted by courts, of permitting and enforcing tactical litigation decisions that result in the irrevocable waiver of certain claims. Rather than being a departure from established practice, the Second Circuit's holding thus relies on fundamental principles of waiver and estoppel that are essential to many aspects of federal litigation.

For example, federal habeas corpus requires exhaustion of claims in state court. 28 U.S.C. § 2254. When a prisoner files a petition for a writ of habeas corpus that contains both exhausted and unexhausted claims, he must either seek a stay of his petition while exhausting all claims – an option that is often unavailable (see *Rhines* v. *Weber*, 544 U.S. 269 (2005)) – or proceed immediately with the exhausted claims by forever waiving relief as to his unexhausted claims. *Rose* v. *Lundy*, 455 U.S. 509, 520 (1982). See also *Rhines*, 544 U.S. at 278 (same). See, *e.g.*, *Andrew* v. *Vare*, 04-cv-00695, 2007 WL 766332, at *3 (D. Nev. Mar. 8, 2007) (stating that the petitioner could elect to "submit a sworn declaration voluntarily abandoning the unexhausted claims in his federal habeas petition, and proceed only on the exhausted claims"); *Fernandez* v. *Cattell*, 06-cv-281, 2006 WL 2690076, at *3

(D.N.H. Sept. 16, 2006) (stating that the plaintiff "has the option of foregoing his unexhausted claims and requesting that the Court proceed promptly with consideration of his sole exhausted claim," but only if he "waive[s] ever having his other issues considered by this Court").

This habeas exhaust-or-waive rule operates much like the Second Circuit's Section 1983 waiver rule: to proceed with a Section 1983 suit seeking damages for a disciplinary proceeding that resulted in mixed sanctions the prisoner must forever waive all claims with respect to the sanctions relating to length of confinement. Otherwise, his entire claim must be dismissed.

Waiver of claims and causes of action are commonplace in other areas of the law as well. In the context of criminal plea agreements, for instance, individuals routinely waive the right to pursue certain claims with respect to appeals. Courts just as routinely enforce such plea agreements and appeal waivers. See, *e.g.*, *United States* v. *Novosel*, 481 F.3d 1288 (10th Cir. 2007) (enforcing an appeal waiver in a plea agreement by dismissing the appeal). Likewise, parties who reach settlement agreements in civil suits often also include waivers as to further litigation. Courts routinely uphold such waivers. See, *e.g.*, *Johnson* v. *Flowers*, 2007 WL 959421 (6th Cir. Apr. 2, 2007) (applying judicial estoppel to prevent a plaintiff from bringing a claim she agreed to waive in a prior settlement agreement). Indeed, some waivers are implicit in the pleadings; for example, basic principles of claim preclusion hold that "a suit for injunctive relief precludes a second suit on the same cause of action for damages." 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure 2d § 4410 (2007). The Second Circuit's holding, which would condition a prisoner's right to proceed with a Section 1983 suit challenging mixed sanctions on a waiver of habeas-related claims, is thus well-grounded in long-established law and litigation practice.

3. Petitioner's argument, Pet. 15-16, that state law would preclude a prisoner from waiving entitlement to early release is plainly mistaken. Petitioners assert that "[u]nder state law, [the New York State Department of Correctional Services] must expunge a disciplinary determination that has been judicially or administratively annulled, and neither it nor any other state agency may rely on it for any purpose." Pet. 15. But the cases cited by petitioner in support of this assertion in fact demonstrate the opposite.

In *Garrett* v. *Coughlin*, 516 N.Y.S.2d 796 (1987), for instance, the court stated that expungment is just one "available remedy" or form of "appropriate relief" following the annulment of an adverse judgment. *Id.* at 797. It is neither an indispensable nor *sua sponte* remedy. A court may, in its discretion, opt not to order expungment. *Ibid.* Following success on the merits, a prisoner may seek a mandamus order requiring expungment in an Article 78 proceeding, but the court will offer relief only when the refusal to expunge was "arbitrary and capricious." *Ibid.* And if a plaintiff were to waive expungment as a condition of proceeding with his Section 1983 suit, a court's refusal to order expungment surely would be neither arbitrary nor capricious.

For this same reason, *Matter of Blanche* v. *Travis*, 760 N.Y.S.2d 919 (App. Div. 2003), and *Matter of Davidson* v. *Coughlin*, 546 N.Y.S.2d 247 (App. Div. 1989), are equally unavailing for petitioners. Because a prisoner invoking the Second Circuit's procedure will have waived his or her right to challenge the fact or length of confinement, any Article 78, habeas, or other proceeding seeking shortened confinement for the same grounds as adjudicated in the Section 1983 suit would be strictly barred.

4. As the Second Circuit properly observed, its ruling is also essential to prohibit prison authorities from insulating disciplinary proceedings from Section 1983 review. Pet. App. 16a n.8. If petitioners were correct and a prisoner could

never challenge "mixed sanctions" through Section 1983 suits – even when the prisoner disavows any relief affecting the length of confinement – prison administrators would have a strong incentive *always* to impose "mixed sanctions" when adjudicating punishment through prison disciplinary proceedings. That would allow prison officials to postpone, and often effectively to preclude, the use of Section 1983 suits to challenge prison disciplinary proceedings. In many cases, that would foreclose access to an important vehicle for the enforcement of federal rights. See *Muhammad*, 540 U.S. 752 n.1 ("The assumption is that the incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction, not special disciplinary confinement for infraction of prison rules. This Court has never followed the speculation in *Preiser* * * * that such a prisoner subject to 'additional and unconstitutional restraints' might have a habeas claim independent of [Section] 1983."). See also *Sandin* v. *Conner*, 515 U.S. 472, 476 (1995) (Section 1983 action brought to challenge disciplinary hearing resulting in punitive confinement).

Moreover, as the Court stated earlier this Term, the fact that district courts must deal with large numbers of prisoner cases does not permit the imposition of special procedural rules that are not supported by law. *Jones* v. *Bock*, 127 S. Ct. 910, 926 (2007). Congress has dictated a method for dealing with the "outsized share of [prisoner] filings" in federal district courts – the Prison Litigation Reform Act (PLRA). *Id.* at 914. The PLRA contains both an exhaustion provision designed to resolve complaints before they become lawsuits, 42 U.S.C. § 1997e(a), and screening provisions intended to speed dismissal of frivolous claims, 28 U.S.C. §§ 1915A(b)(1) & 1915(e)(2)(B); 42 U.S.C. § 1997 e(c)(1).

Further, as a practical matter, the Second Circuit rule will not produce the "massive increase in filings [that will] inundate the federal courts" foreseen by petitioners. Pet. 18. First, the number of disciplinary cases involving sanctions

severe enough to trigger due process concerns will be small (see *Sandin*, 515 U.S. at 484), and the category of disciplinary cases involving mixed sanctions will be limited – unless, as discussed above, prison officials begin to impose confinement sanctions in all cases for the purpose of avoiding federal review, a result the Court should not countenance. Second, the number of cases in which a prisoner will execute a waiver of the sort authorized by the Second Circuit will be limited for the simple reason that many prisoners value their freedom more than a damages award. Such prisoners are unlikely to pursue a Section 1983 suit when it requires a permanent waiver of claims that could reduce the length of their confinement. Third, following the PLRA, prisoners who file Section 1983 suits must pay filing fees, 28 U.S.C. § 1915, and have limited ability to recover attorney's fees, 42 U.S.C. § 1997e(d); these requirements discourage insubstantial suits.

Finally, petitioners' unsupported assertion that the Second Circuit's rule "would have a serious negative effect on prison security," Pet. 15, is without merit. A prisoner who expressly waives his claims as to fact and length of confinement so as to pursue a conditions-of-confinement claim will have *voluntarily* surrendered the possibility of restored good time credits. There is no reason to assume that the prison population will resent implementation of an agreement freely and knowingly entered into by a prisoner so as to gain a tactical benefit in litigation. In any event, these individuals will create no more a threat to security than any other prisoner who believes himself or herself wrongfully accused, convicted, or detained.

## III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Finally, several features of this case make it a poor vehicle for addressing whether a prisoner may pursue a Section 1983 suit when he or she irrevocably waives relief with re-

spect to sanctions affecting the duration of confinement. To the extent that the issue presented by the petition holds any interest, the Court should defer addressing it until presented with a suitable case.

1. First, litigation is ongoing in this case and there are several crucial points that remain to be resolved on remand from the Second Circuit's decision. Indeed, because the Second Circuit has remanded the case to determine whether respondent is willing to waive claims relating to the length of his sentence, there exists a real chance that this case will become moot. For instance, following remand to the district court, respondent and petitioners may agree to settle the case with respect to the conditions-of-confinement sanctions. Alternately, depending upon the precise scope and terms of the required waiver, respondent may choose not to waive and instead elect to renew an Article 78 petition in New York state court or pursue some other means of seeking relief relating to the length of his confinement. Further, the question presented may become moot if, following remand, the case is dismissed on alternative grounds such as qualified immunity or an adverse ruling on the merits.

2. Additionally, the Court should not address the question presented in the abstract. Rather, it should have before it an executed waiver. The precise content and form of any given waiver may be relevant to the Court's decision because the Court ultimately may affirm the Second Circuit's authorization of a waiver but wish to ensure that the waiver is consistent with the Court's recent decisions regarding the favorable-termination rule. Without the benefit of a specific waiver in the record, this case presents an unsuitable vehicle for reviewing the Second Circuit's rule.

3. Further, the factual record of respondent's state-court proceeding is both unclear and unusual. The Second Circuit, reviewing the record, indicated that respondent exhausted his appeals within the prison and then filed an Article 78 petition

in New York Supreme Court challenging the prison proceeding. Pet. App. 4a. Although the state-court judge granted leave to file as a poor person, respondent alleges that the court declined to waive the filing fee. *Ibid.* When respondent was unable to pay the fee, his case was dismissed and his appeal to the New York Court of Appeals denied. *Ibid.* The State describes this outcome, if it occurred, as an "anomaly," Pet. 3 n.3, because New York law allows a prisoner suit to proceed even if the plaintiff is unable to pay the filing fees. N.Y. C.P.L.R. § 1101(f)(1), (2). Here, it is unclear why the appellate court dismissed the action after granting respondent leave to proceed as a poor person. As a result, it is unclear whether respondent may re-file his Article 78 petition.

This confusion in the factual record – exacerbated by the fact that the case file evidently was lost while being transferred from the appellate division to the state trial court – may implicate an important legal question that has not been resolved by this Court: whether the unavailability of habeas relief allows a prisoner to proceed with a Section 1983 claim that would otherwise be barred by *Heck*.[6] As recognized in *Monroe* v. *Pape*, 365 U.S. 167, 173 (1961), one of the principal purposes served by Section 1983 is providing "a federal remedy where the state remedy, though adequate in theory, is not available in practice." See also *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990) (reiterating the same). Here, through what petitioners call an "anomaly," no remedy was practi-

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[6] Although the Second Circuit indicated that respondent did not challenge the district court's conclusion that "'plaintiff's inability to pursue a habeas remedy is due to his own failure to properly pursue his state challenge to the disciplinary proceeding'" (Pet. App. 6a n.4) – that is, his inability "to pay the required filing fee" (*id.* at 22a) – this complex question cannot be so easily dismissed on the basis of pro se briefing and an incomplete factual record.

cally available to respondent in state court.[7] In this setting, it is not clear whether a federal habeas remedy is available to respondent.

This Court, however, has never resolved whether a prisoner who may not be eligible for federal habeas may bring a claim through Section 1983 that would otherwise be barred by *Heck*. Compare *Spencer* v. *Kemna*, 523 U.S. 1, 21 (1998) (Ginsburg, J., concurring) ("Individuals without recourse to the habeas statute because they are not 'in custody' (people merely fined or whose sentences have been fully served, for example) fit within [Section] 1983's 'broad reach.'") with *Wilkinson*, 544 U.S. at 87-88 (Scalia, J., concurring) ("[A] prisoner who wishes to challenge the length of his confinement, but who cannot obtain federal habeas relief because of the statute of limitations or the restrictions on successive petitions, §§ 2244(a), (b), (d), cannot use the unavailability of federal habeas relief in his individual case as grounds for proceeding under [Section] 1983."). See also *Muhammad* v. *Close*, 540 U.S. at 752 n.2 (case presented "no occasion" to address the question whether "unavailability of habeas for other reasons may also dispense with the *Heck* requirement."). That the present case may implicate this disputed

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[7] Under state law, the state court should have dismissed respondent's Article 78 proceeding without prejudice for failure to perfect. See, *e.g.*, *Arbisser* v. *Gelbelman*, 660 N.Y.S.2d 133 (App. Div. 1997) (explaining that when a plaintiff fails to file the required index fee, the action will be "deemed dismissed without prejudice" under New York law). Given the ambiguity of the disposition in this case, it is unclear whether respondent could proceed under 28 U.S.C. § 2254, which states that a habeas petition may not be granted "if [the prisoner] has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Although respondent technically had the "right" to refile his Article 78 suit, he did not have the means to pay the now-$190 index fee, which the court had previously declined to waive.

question – on a record leaving considerable doubt about the treatment of respondent's state habeas claim and the current availability of state habeas relief (in the event such relief is not waived by respondent) – will complicate this Court's review of the question presented and provides another basis for denying the petition.

* * * *

This case presents an issue that has been addressed by only one court of appeals, on a record that is incomplete and in some respects ambiguous; this Court should deny the petition so that other lower courts have an opportunity to consider the Second Circuit's waiver rule. Additionally, the approach taken by the Second Circuit is fully consistent with this Court's precedents. Finally, to the extent that the issue presented is of interest, the Court should defer review until presented with a case that presents the issue cleanly.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2007

# APPENDIX

## APPENDIX A[1]

In the United States District Court
For the Southern District of New York

JOSE PERALTA, plaintiff, pro se

v.

SANDRA VASQUEZ, Correction Counselor; ROBERT A. JONES, Assistant Deputy Superintendent of Program Services; DONALD SELSKY, Director, Special Housing/Inmate Disciplinary Programs; ANITA R. FLORIO, Judge of the Appellate Division, Second Department; GUY JAMES MANEANO, Judge of the Appellate Division, Second Department; MARTIN H. BROWNSTEIN, Former Court Clerk; JAMES EDWARD PELZER, Court Clerk of Appellate Division, Second Department;

Defendants.

AMENDED COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

01-Civ. – 3171

Chief Judge Michael B. Mukasey

**I. Previous Lawsuits:**

I've filed no previous lawsuits in State or Federal Court even remotely related to this action or to my imprisonment.

**II. Place of Present Confinement:**

There is a grievance procedure in this present prison, and in the previous prisons where the violations occurred. However, the grievance process cannot be utilized for Disciplinary Proceedings. However, using the Disciplinary process, I did appeal the Tier III Hearing of Fishkill Correctional Facility, to Donald Selsky in Albany, New York's Department of Correctional Services ("DOCS") Headquarters, then I ap-

[1] Errors in the handwritten documents reproduced in these appendices appear in the originals and are not corrected here.

pealed to State Supreme Court via Article 78 proceeding, which was then ordered to the transferred from Poughkeepsie, N.Y. Supreme Court, to the Appellate Division, Second Judicial Department. The Appellate Division dismissed and I appealed to the State's highest Court, the New York State Court of Appeals, who Denied my Leave application.

**III. Parties:**

The plaintiff's name is JOSÉ PERALTA, #95-A-2340, who's address is Clinton Correctional Facility, P.O. Box 2001, Dannemora, New York 12929.

The Defendant Sandra B. Vasquez, is employed as a Correctional Counselor at Fishkill Correctional Facility, Prospect Street, P.O. Box 307, Beacon, New York 12508.

The Defendant Robert A. Jones, is employed as Assistant Deputy Superintendent of Program Services at Fishkill Correctional Facility, Prospect Street, P.O. Box 307, Beacon, New York 12508.

The Defendant Donald Selsky is employed as Director, Special Housing/Inmate Disciplinary Programs at the NYS Department of Correctional Services, State Office Building Campus, 1220 Washington Avenue, Albany, New York 12226.

The Defendant Anita R. Florio is employed as a Judge of the Appellate Division, Second Judicial Department, at 45 Monroe Place, Brooklyn, N.Y. 11201.

The Defendant GUY JAMES MANGANO is employed as a Judge of the Appellate Division, Second Judicial Department, at 45 Monroe Place, Bklyn, N.Y., 11201.

The Defendant Martin H. Brownstein is employed formerly as the Clerk of the Court at the Appellate Division, Second Department, 45 Monroe Place, Bklyn, N.Y. 11201.

The Defendant James Edward Pelzer is employed as the present Clerk of the Court, at the Appellate Division, Second Department, 45 Monroe Place, Bklyn, N.Y. 11201.

**IV. Statement of Claim:**

**CLAIM AGAINST SANDRA B. VASQUEZ**

1) On May 16, 1998 while at Fishkill Correctional Facility, the plaintiff was accused of violating the Inmate Rule Book charges: 104.11 'Violent Conduct'; 104.12 'Demonstration; 100.10 'Assault on Inmate'; and, 105.12 'Unauthorized Organizations/Activity.' The Report being written by a one Sergeant M. Capra, and dated May 29, 1998, alleged under a "Conspiracy" theory, that plaintiff was responsible for inmate Valcarcel being cut several times with a razor-type weapon and having to receive about 60 stitches.

2) Sergeant Capra's report, which is premised upon his "opinion" of plaintiff's involvement, in particular, alleges that at approximately 2:00 p.m., inmate Valcarcel was arguing in the prison yard with inmate Torres. Prison staff noticed the altercation, thus causing the two prisoners to cease arguing. However, at 2:55 p.m. the altercation picked back up and continued later, in the general population cell block "L-Unit", in the bathroom area, where inmate Torres supposedly cut inmate Valcarcel several times.

3) The report, being based upon the writer's opinion, is also based upon witness, as well as confidential-witness hearsay and double hearsay, nothing directly linking plaintiff to this incident as being either the assaulter or the assaulted.

4) Being a non-English speaking latino from the Dominican Republic, the plaintiff was provided with a copy of the "Inmate Misbehavior Report," both in English and one in Spanish, and was also assigned Sandra B. Vasquez to act as his Spanish Speaking Tier Assistant.

5) Outside of obtaining a statement from plaintiff saying plaintiff knows nothing about the assaulted inmate, and that plaintiff lives in "I-Unit", not "L-Unit" where the assault happened, Defendant Vasquez's employee assistance to plaintiff was wholly inadequate to prepare plaintiff for a Superintendent's proceeding on disciplinary charges as pro-

vided/required by rule, where Vasquez did not interview or obtain statements from witnesses requested by plaintiff, outside of notifying Sgt. Capra that plaintiff would be calling him to testify as to the Tier III ticket Sgt. Capra wrote against plaintiff; Defendant Vasquez made no effort to investigate plaintiff's claim of innocence such as interviewing and finding the identities of prison staff who allegedly witnessed the altercation in the prison yard between inmate Valcarcel and Torres, or the prison-staff that conducted the investigation which led to the charges against plaintiff, or to ascertain the identities and locations of the confidential informants who provided the prison-staff with all the hearsay and double-hearsay statements that resulted in the charges against plaintiff; nor did the Assistant Vasquez try to ascertain where inmate Valcarcel was being transferred to, for a possible interview and a written statement, since plaintiff requested the assaulted inmate Valcarcel as an alibi witness, to support plaintiff's claim that he was not even in the yard at the time of the argument incident that led to the cutting; nor did Vasquez obtain any internal prison movement records/documentation that could've easily proven plaintiff's whereabouts at the time of the incidents.

6) Further addressing Defendant Vasquez's inadequate assistance, which assistant initiated on June 2, 1998 at 9:05 a.m., and concluded at June 7, 1998 at 9:05 a.m., Vasquez did not determine whether her non-English speaking client-subject ever received an English and Spanish version of the 'revised February 1998' Inmate Rule Book, that began allowing prisoners to be charged and disciplined under 'Conspiracy theory' counts, when in fact, plaintiff never received the newly revised Inmate Rule Book.

7) Vasquez did not even provide her client-subject with a copy of DOCS, Directive #4932 which governs and explains the rights of a prisoner at a Tier Hearing.

8) As an Employee Assistant to prisoners facing serious discipline charges, Vasquez can be credited with having ba-

sic knowledge of her duties and obligations to plaintiff in preparation for a Tier III hearing as spelled out in Directive #4932, Section 251-4.1/& 251-4.2, therefore Vasquez acted with bad faith in the face of clearly established Directives. Plaintiff had no Defense.

**CLAIM AGAINST ROBERT A. JONES**

9) After Defendant Vasquez's employee assistance to plaintiff, Defendant Jones conducted a Superintendent's hearing, as the "Hearing Officer", on June 12, 1998 at 12:56 p.m., after which Jones found plaintiff Guilty of all charges, notwithstanding plaintiff's Not Guilty plea, and giving plaintiff a penalty of five years (60 months) of SHU confinement (where plaintiff was immediately taken to after the inmate-on-inmate assault on May 16, 1998); five years loss of Packages; five years loss of Commissary; five years loss of Phone privileges; and five years loss of Good Time, of which good-time loss has triggered plaintiff's liberty interest, since plaintiff has been committed to New York State, DOCS custody, to serve 8½ to 25 years in prison.

10) Hearing Officer Jones was bias, unfair, and partial throughout the Hearing, basing the finding of plaintiff's guilt on a third party's (hearsay) assessment of informant's credibility, as the only evidence of reliability of informant'(s) in camera, or taped testimony, without the hearing officer making his own assessment(s) of confidential witnesses and informants; Jones acknowledged the fact that plaintiff received inadequate assistance, but still continued the hearing without amending the issue by adjourning hearing so that plaintiff can receive proper assistance; by not inquiring into the impropriety of inmate Valcarcel's transfer out of the facility before he could be questioned by all parties to the hearing; by relying on a correction officer's allegation that inmate Valcarcel refused to testify for plaintiff, without quoting verbatim on the audio-hearing record, the reason inmate Valcarcel offered.

## CLAIM AGAINST DONALD SELSKY

11) Clearly reiterating the Tier Hearing arguments, plaintiff argued on appeal to Donald Selsky, that the hearing officer was in non-compliance with Directive #4932 which also governs the conduct and method of determination a hearing officer must follow in order to hold a fair and impartial hearing, as well as the arguments challenging Defendant Vasquez's assistance, as both are alleged herein in above-paragraph/statements 1 through 10, after which, Selsky notified plaintiff to send him all material supporting plaintiff's Tier III appeal – Selsky's letter being dated July 8, 1998.

12) As opposed to granting plaintiff a full reversal, expungement of charges, and restoration of good-time, Selsky "MODIFIED" the penalty, from 60 months loss of good-time, privileges, and SHU confinement, to 24 months loss of good-time, privileges, and SHU confinement, which plaintiff served in full satisfaction.

13) Plaintiff then sought Judicial intervention for a Reversal, by way of Article 78/Order to Show Cause.

## CLAIM AGAINST JUDGES ANITA R. FLORIO & GUY JAMES MANGANO

14) After the Poughkeepsie County Supreme Court transferred plaintiff's Article 78 proceeding to the Appellate Division, Second Department (because plaintiff raised a meritorious Substantial Evidence question), by Order dated June 10, 1999, Presiding Judge Anita R. Florio issued an August 31, 1999 "Decision & Order On Motion" which, in contradiction of it's own terms, granted plaintiff leave to appeal as a poor person, but at the same time failed to waive the State Court's $250.00 filing fee, requiring plaintiff, a poor, pro se prisoner, to pay the filing fee in full first before being given any further access to the Court – on plaintiff's appeal as of right to the Appellate Division, Second Department.

15) Plaintiff simply could not afford to pay this initial filing fee in full, which, as a result, caused presiding Judge Guy

James Mangano to review the plaintiff's State & appellate court file and issuing an Decision & Order, on the Court's own motion, dated June 7, 2000, Dismissing plaintiff's entire case and cause for failure to timely perfect the appeal, knowing plaintiff was granted poor person status in the lower article 78 Court, and knowing plaintiff could not pay an advance $250.00 filing fee in full, denying plaintiff access to that Court.

16) Plaintiff's appeal to the NYS Court of Appeals, (from the Dismissal Order and Poor Person Order) was denied on February 8, 2001, by Chief Judge Judith S. Kaye.

**CLAIM AGAINST DEFENDANTS MARTIN H. BROWNSTEIN & JAMES EDWARD PELZER**

17) By letter dated October 18, 1999, Defendant Brownstein wrote plaintiff, refusing to File any papers, unless plaintiff, who is a non-english speaking, non-english writing prisoner, submits a professional nine copies of an Appeal Brief in strict conformance to the Court Rules, holding plaintiff to the standards of a competent licensed attorney, and then telling plaintiff that he must pay a $250.00 filing fee.

18) Brownstein, the Court Clerk of the Appellate Division Second Department during that time, again wrote plaintiff/appellant a letter dated October 26, 1999 saying that the August 31, 1999 order by Presiding Judge Anita R. Florio, (in Matter of Peralto v. Jones, Docket No. 99-05445) did not waive the $250.00 filing fee, but yet its grants plaintiff poor person status.

19) Present Court Clerk James Edward Pelzer, ENTERED the June 7, 2000 order, effectively dismissing plaintiff's one direct appeal, as of right, from the Appellate Division, Second Department's Calendar, hermetically sealing the Court up, and denying plaintiff access to it, for failing to pay filing fee and then perfecting the appeal.

## V. CLAIMANT'S FIRST CAUSE OF ACTION

20) Whether viewed in concert, or separately, the actions/inactions of the named DOCS Defendants in denying plaintiff adequate assistance, witnesses, and a fair and impartial hearing officer, and a fair and impartial appeal officer, deprived plaintiff of substantive and procedural due process of law and protection against cruel and unusual punishment, in the 14th Amendment & 8th Amendment of the United States Constitution.

## CLAIMANT'S SECOND CAUSE OF ACTION

21) Whether viewed in concert, or separately, the action/inactions of the named Appellate Division, 2nd Dept., Judges/Clerks in requiring plaintiff to pay a full filing fee in advance, and then dismissing plaintiff's appeal for plaintiff's inability to pay, and appeal time expiration, in the face of plaintiff's poor person grant, deprived plaintiff of his First Amendment, United States Constitutional Right to Access to the Courts and to Petition the governmental for a redress of grievances, as well as denying plaintiff substantive & procedural due process under Fourteenth Amendment, U.S. Constitution.

## VI. RELIEF

Plaintiff, sues Defendants in their individual capacity and/or in their official capacity;

Plaintiff, seeks compensatory damages in the amount of Eight Million Dollars and punitive Damages in the amount of Twelve Million Dollars totaling: Twenty-Million Dollars ($20,000,000.00) plus costs and disbursements of this action, plus interest;

Plaintiff, also seeks injunctive relief and declaratory relief Ordering Defendants to refrain from such Federal violations in the future; the total damage award sought, being inclusive of emotional distress and mental anguish suffered.

PLAINTIFF SWEARS UNDER THE PAINS & PENALTY OF PERJURY THAT THE FOREGOING IS TRUE & CORRECT.

Executed On: May 31, 2001.

/s/ José Peralta
JOSÉ PERALTA
95-A-2340
CCF/P.O. Box 2001
Dannemora, NY 12929
Plaintiff, pro se.
cc: Filed.

**PROOF OF SERVICE**

**STATE OF NEW YORK )**
**COUNTY OF CLINTON ) ss.:**

JOSÉ PERALTA, being duly sworn, deposes and says that on this First day of June, 2001, I have mailed the original 'Amended Complaint' (in PERALTA vs. VASQUEZ, 01-Civ-3171 (MBM)), along with the attached court copy of Honorable Chief Judge Michael B. Mukasey's April 16, 2001 'Order', to:

Pro se Clerk's Office
United States District Court
Southern District of New York
U.S. Courthouse – 500 Pearl Street
New York, NY 10007

by enclosing same inside of a secure envelope, wrapped and addressed as above, with this Proof of Service enclosed, and depositing same inside of a mail-drop-box regularly maintained for outgoing U.S. Mail, by the prison officials here at Clinton Correctional Facility.

Deponent swears under the penalty of perjury that the foregoing is true and correct.

Executed on: May 31, 2001.

/s/ José Peralta
JOSÉ PERALTA
95-A-2340
CCF/P.O. Box 2001
Dannemora, NY 12929
Plaintiff, pro se.
cc: Filed.

**APPENDIX B**

APPELLATE DIVISION SUPREME
COURT OF THE STATE OF NEW YORK

| | |
|---|---|
| THE STATE OF NEW YORK<br><br>– against –<br><br>JOSE PERALTA | AFFIDAVIT OF SERVICE.<br><br>RE: MATTER OF PERALTA V. JONES<br>DOCKET NO. 99-05445 |

STATE OF NEW YORK )
) S.S.
COUNTY OF KINGS )

JOSÉ PERALTA, PETITIONER HEREIN, BEING DULY SWORN, DEPOSES AND SAYS THAT.

ON THE ____ DAY OF DECEMBER 1999. I PLACED INTO THE HAND OF NOTARY PUBLIC AT SOUTHPORT CORRECTIONAL FACILITY. THE FOLLOWING LEGAL DOCUMENTS, IN PRE-SEALED (WRAPPERS), ORDER TO SHOW CAUSE, PETITIONER'S ARTICLE 78 PETITION IN WHICH ADSP R. JONES AND DONALD SELSKY WERE NAMED AS RESPONDENTS.

1) ADSP R. JONES
FISHKILL CORR. FACILITY
P.O. BOX 1245
BEACON, N.Y. 12508-1245

2) DONALD SELSKY
STATE OFFICE BUILDING
CAMPUS #2
ALBANY, N.Y. 12226

3) ATTORNEY GENERAL
DEPARTMENT OF LAW
STATE CAPITAL OFFICE BUILDING
ALBANY, N.Y. 12224

**APPENDIX C**

At a term of the Supreme Court of the State of New York, held in and for the County of Dutches on the _____ day of _____, 19_____.

Present: Hon. _____
_____, Justice

Supreme Court of the State of New York
County of Dutches.

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| | | |
|---|---|---|
| in the Matter of the Application of | < | |
| José Peralta, | petitioner, < | Order to Show |
| | < | Cause |
| - against - | < | |
| | < | |
| ADSP. R. Jones and | < | Index No. |
| Superintendent of Fishkill, | Respondent < | |
| Facility. Donald Selsky Director (SHU) | < | |
| for a Judgment pursuant to Article 78 | < | |
| of the Civil Practice Law and Rules | < | |

---

Upon the annexed petition of José Peralta, verified on the October 14, 1998, and the affidavit of petition, sworn to on October 14, 1998, it is

Ordered that Respondent ADSP, R. Jones and the Superintendent of fishkill facility show cause at a term of this Court, to be held in the county of Dutches on the October 29, 1998, or as soon thereafter as counsel may be heard, why a judgment should not be made and entered in this matter pursuant to Article 78 of the Civil practice Law and Rules:

1. Vacating and setting aside Respondents determination of June 12, 19998., assigning petitioner to 5 years of SHU, 5

years lost of Commissary, Packages and Phone and 5 years of Good time. SHU Special Housing Unit (solitary confinement, "SHU") because [the underlying Superintendent's Hearing is null and void, also because all my due process rights was violated!,]

2. Directing Respondent to [expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner records and restore petitioner in all respects to the status he enjoyed prior to the commencement of said Superintendent's Hearing]

3. Granting such other and further relief as the Court may deem just and proper. it is further

Ordered that pending the Hearing of this special proceeding and pursuant to section 7805 of the C.P.L.R., Respondent and all other officers, employees, agents, attorney and persons working in active concert and participation with Respondent are stayed and prohibited from taking action related to or enforcing Respondent's determination of June 12, 1998: it is further

Ordered that service of a copy of this Order together with the papers upon which it is granted, upon both the Respondent ADSP. R. Jones and Superintendent of fishkill facility, and the Attorney General, by mail, on or before October 29, 1998, shall be deemed sufficient.

Enter:

_____

Justice of the
Supreme Court

## APPENDIX D

Supreme Court of the State of New York
County of Dutches.

| | | |
|---|---|---|
| in the Matter of the Application of | < | |
| José Peralta | petitioner, < | Affidavit in Support |
| | < | of Order to Show |
| - against - | < | Cause |
| | < | |
| ADSP. R. Jones and | < | Index No. |
| Superintendent of Fishkill, | Respondent < | |
| Facility. Donald Selsky Director (SHU) | < | |
| for a Judgment pursuant to Article 78 | < | |
| of the Civil Practice Law and Rules | < | |

State of New York) ss.:
County of Clinton)

I, José Peralta, being duly sworn, depose and say:

4. I am the petitioner in the above-entitled proceeding.

5. I make this affidavit in support of my annexed application for an order to show cause to prosecute the attached petition pursuant to Article 78 of the Civil Practice Law and Rules which challenges:

Incident: 05/16/98 02:00 PM

Reporter: 05/29/98

Hearing: 06/12/98 01:04 PM ADSP R. Jones

Facility: Fishkill facility

Disposition Received: 5 years of S.H.U. 5 years lost of commissary, packages and phone and 5 years lost of good time. ("SHU") Special Housing Unit (solitary confinement, "SHU")

104.11 Violent Conduct, 104.12 Demonstration, 100.10 Assault on inmate, 105.12 Unauth Org./act.

6. the [specific grounds] are as follows: (1.251-42 Assistant); (2.253.1(b) Hearing Officer); (3.253.6 Method of Determination and they are substantiated in part by criminal law (Pino v. Dalsheim 605 F.Supp. 1305) due process violation.

a. Upon receipt of report petitioner requested assistant (Spanish speaking) to obtain non-disruptive documents to assist petitioner in proper defense at hearing. Even though Assistant did appear before petitioner, Assistant failed to perform Assistants obligations of providing petitioner with requested documentation and Assistant further knowingly and maliciously lied by signing on Assistant sheet that petitioner had received everything he had asked for and refused to sign indicating that Assistance was in fact previded - thus further hindering Appellant at his Hearing.

b. Hearing officer proved to be unfair and partial in his conducting this hearing when after acknowledging (Mr. R. Jones) the fact that petitioner had not been properly Assisted, continued hearing without amending this issue by ordering proper Assistance to petitioner.

c. The Method of Determination as described in Directive # 4932 states that (all) material (must) be weighed and Judge by Hearing officer (before) any decision is rendered and if there is (any) discrepancy as to the following of these Directives and their guidelines then Misbehavior Report (must) be dismissed with prejudice! the outcome of this Hearing is not only a Miscarriage of D.O.C.S. Guidelines but also a blatant violation of petitioner Due process Rights.

Furthermore please see Matters of Brooks v. Scully, 504 NYS 2d. 387 Supp. 1986).

The Court held that, the Regulation requiring that an inmate be provided with an Assistant under such circumstances is essential for the reasonable ability of the inmate to cause and Guide a <u>appropriate investigation</u> to obtain witnesses or

other relevant proof in defense of the Charges lodged against him.

The court views the need for a meaningful discharge of his rile by the inmate Assistant in compliance with the mandate of the Regulations to be inexplicable interwoven in that Modicum of Due process to which an inmate is entitled in Disciplinary proceedings brought Against him...

(According to New York Jur 2d Vol 83. Penal and Correctional institutions pg. 194 § 84.92 [Prison officials Must of Course Comply with their own regulations and failure to do so Justifies Judicial intervention...)

(see also Matters of Giano v. Sullivan 709 F.Supp 1209) regarding tier Assistance of Marshaling facts of Requested Documents and rile of Assistant)

7. Petitioner appeal this matter to Donald Selsky. Director, Special Housing., Department of Correctional Svc. and the Commissioner. which was review and modified on August 21, 1998. (See attach Documents.

8. Petitioner seeks to proceed by order to show cause rather than by Notice of petition because I do not want to wrongfully be placed in Solitary Confinement, with-out have an opportunity to have the court review my case.

9. Petitioner designates Dutches County as the place of venue.

10. No previous applications for the relief requested herein has been mâde to any Court.

11. I have moved by the annexed application to proceed as a poor person.

Wherefore, petitioner respectfully request that this Court enter an Order directing Respondent to Show Cause why a Judgment should not be made and entered pursuant to Article 78 of the Civil Practice Law and Rules I am the petitioner in the above-entitled proceeding I make this affidavit in support of my annexed application for an Order to Show Cause to

prosecute the attached petitioner pursuant to Article 78 of the Civil Practice Law and Rules which petitioner challenges and granting such other and further relief as the Court may deem just and proper.

_____

[signature of José Peralta]

Sworn to before me this
14 day of Oct, 1998

_____

NOTARY PUBLIC

JOHN W. KIRKPATRICK
Notary Public, State of New York
Registration No. 4826104
Qualified in Clinton County
Commission Expires April 11, 2000

## APPENDIX E

Supreme Court of the State of New York
County of Dutches.

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| | | |
|---|---|---|
| in the Matter of the Application of | < | |
| José Peralta petitioner, | < | Verified Petition |
| | < | |
| - against - | < | |
| | < | |
| ADSP. R. Jones and | < | Index No. |
| Superintendent of Fishkill, | < | |
| Facility. Donald Selsky Director (SHU) | < | |
| Respondent | < | |
| For a Judgment pursuant to Article 78 | < | |
| of the Civil Practice Law and Rules | < | |

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To: THE SUPREME COURT OF THE STATE OF NEW YORK FOR DUTCHES COUNTY

The petition of José Peralta, complaining of the Respondent, ADSP R. Jones., Superintendent of fishkill facility., Donald Selsky, Director (SHU). Respectfully alleges:

1. Petitioner José Peralta is an inmate at Clinton Correctional Facility, P.O. Box 2001, Dannemora, N.Y. 12929

2. Respondent [Superintendent of fishkill facility, is in charged with the overall supervision and administration of fishkill facility.

3. this petition challenges [disciplinary action taken on June 12, 1998, when Respondent, [pursuant to a Superintendent's Hearing,] had determined to [place him in the Special Housing Unit ("SHU", Solitary Confinement) for a period of 5 years / modified to two years. Even know that my due process Rights are violate, which is unconstitutional.

4. the [specific grounds are as follow: (1.251.6 Method of Determination) and they are substantiated in part by criminal law (Pino v. Dalsheim 605 F.Supp. 1305) due process violation.

5. Upon Receipt of Report petitioner Requested Assistant (Spanish speaking) to obtain Non-Disruptive Documents to Assist petitioner in proper Defense at hearing. Even though Assistant did Appear before petitioner, Assistant failed to perform Assistants obligations of providing petitioner with Requested Documentation and Assistant further Knowingly and Maliciously Lied by Signing on Assistant Sheet that petitioner had Received Everything he had asked for and Refused to sign indicating that Assistance was in fact previded - thus further Hindering Appeallant at his Hearing!

6. Hearing officer proved to be unfair and partial in His Conducting this hearing when after acknowledging (Mr. R. Jones) the fact that petitioner had not been properly Assisted, Continued Hearing with-out Amending this issue by Ordering proper Assistance to petitioner.

7. the Method of Determination as Described in Directive # 4932 states that (all) material (must) be weighed and Judge by Hearing officer (before) Any Decision is Rendered and if there is (any) Discrepancy as to the following of these Directives and their Guidelines with prejudice! the outcome of this Hearing is not only a Miscarriage of D.O.C.S. Guidelines but also a blatant violation of petitioner Due process Rights.

Furthermore please see Matters of Brooks v. Scully 504 NYS 2d 387 Supp 1986).

The court held that, the Regulation requiring that an inmate be provided with an Assistant under such circumstances is essential for the reasonable ability of the inmate to cause and Guide a appropriate investigation to obtain witnesses or other relevant proof in defense of the Charges Lodged Against him. The court views the Need for a Meaningful

discharge of his role by the inmates Assistant in Compliance with the Mandate of the Regulations to be inexplicably interwoven in that Modicum of Due process to which an inmate is entitled in Disciplinary proceedings brought Against him...

(According to New York Jur 2d Vol 83. Penal and Correctional institutions pg. 194 § 84.92 [Prison officials Must of Course Comply with their own regulations and failure to do so Justifies Judicial intervention...)

8. Respondent's Determination was [arbitrary, capricious, and abuse of discretion] because (the hearing was held at a time when petitioner was incompetent to proceed on his own behalf. Because (1.251.6 Method of Determination) and they are Substantiated in part by Criminal Law (pino v. Dalsheim 605 F.Supp. 1305) Due Process Violation.

Wherefore, petitioner respectfully requets that Judgement be entered pursuant to Article 78 of the Civil practice Law and Rules:

1. Vacating and setting aside Respondents determination of June 12, 1998 assigning petitioner 5 years to [place him in the special Housing Unit ("SHU" Solitary Confinement) / Modified to 2-years, (SHU) because [the underlying Superintendent's Hearing is Null and Avoid);

2. Directing Respondents to expunge all entries of said Superintendent's Hearing and the resulting disposition thereof from all of petitioner's records and restore petitioner in all respectfs to the status he enjoyed prior to the commencement of said Superintendent's Hearing;

3. Granting such other and further relief as the Court may deem Just and proper.)

Dated: 10-14-98

Clinton Corr Fac

P.O. Box 4001

Dannemora, NY
12929

José Peralta
Petitioner Pro-se

Verification

State of New York )
County of Clinton ) ss.:

José Peralta being duly sworn, deposes and says that deponent is the petitioner in the above-captioned proceeding, that he has read the foregoing petition and knows the contents thereof, that the same is true to deponents own knowledge, except as to Matters therein state upon information and belief, which Matters deponent believes to be true.

José Peralta

Sworn to before me
this 14 day of Oct, 1998

NOTARY PUBLIC

JOHN W. KIRKPATRICK
Notary Public, State of New York
Registration No. 4826104
Qualified in Clinton County
Commission Expires April 11, 2000

## APPENDIX F

State of New York )
) ss.:
County Of Clinton )

José Peralta, petitioner herein, being duly sworn, deposes and says that:

On the _____ day of _____, 1998; I placed into the hands of an officer of the Southport Correctional Facility the following legal documents, in pre-sealed wrappers: Order to Show Cause, Petitioner's Article 78 petition in which ADSP R. Jones and Donald Selsky were named as respondents:

The aforementioned petition was addressed to the following parties, and sent via U.S. Mail Service from the confines of the Southport Correctional Facility to:

| | | |
|---|---|---|
| ADSP R. JONES<br>Fishkill Corr. Facility<br>1245<br>Beacon, NY 12508 | DONALD SELSKY<br>State Office Building<br>Campus #2<br>Albany, NY 12226 | ATTORNEY GENERAL<br>Department of Law<br>State Capitol Office<br>Building<br>Albany, NY 12224 |

Affiant herein affirms under the penalty of perjury that the above is true, accurate, and correct.

Dated: _____
Chemung County, New York

/s/ _____
José Peralta
D.I.N. 95A2340
Southport Corr. Facility. P.O. Box 2000
Pine City, NY 14871

Sworn to and subscribed before me this
18th day of DECEMBER, 1998

NOTARY PUBLIC

RICHARD A. ANGELLOTTI
Notary Public, State of New York
Chemung County 01AN508924

## APPENDIX G

Supreme Court, Appellate
Division, Second Department

| | |
|---|---|
| In the matter of the<br>Application of<br>Jose Peralta<br>Petitioner,<br><br>– against –<br><br>ADSP. R. Jones and<br>Superintendent of<br>Fishkill Corr. Fac,<br>Donald Selsky Director<br>(SHU)<br><br>Respondent(s). | Motion to Proceed As<br>a poor Person<br><br>Index No. 5231/98<br><br>Docket No. 99-05445 |

Please take notice, that upon the annexed Affidavit Sworn to this 28 Day of June 1999 a Motion will be made at a term of this Court to be held at the Appellate Division, Second Department, 45 Monroe Place Brooklyn, New York, 11201, on the ___ Day of ____, 1999 at 1:30 p.m. for an order granting Petitioner permission to proceed as a poor person.

Jose Peralta, 95 A 2340
Petitioner, Pro Se

## APPENDIX H

**Affidavit In Support Of Motion**
**Supreme Court, Appellate Division**
**Second Department, Brooklyn, New York**
**State of New York, County of Chemung**

Jose Peralta, 95-A-2340, Being duly sworn, deposes and says;

1) I am the petitioner in the above entitled action, I have appealed ___ the appellate Division from an Order or Judgment of the Supreme Court, Dutches County, dated, June 10, 1999. The above entitled Action Article 78 has been transferred to this Court by the Supreme Court, Dutches County pursuant to CPLR 7804(g) because of a substantial evidence issue CPLR 7803(4).

2) By this Motion I seek the following relief: Petitioner respectfully request that he be permitted to proceed herein as a poor person, without payment of any cost or fees, that this Court assign a suitable Attorney to serve as Attorney and Counsel for the petitioner herein.

3) Petitioner will be unable to prosecute this proceeding unless permitted to do so as a poor person.

4) The grounds for the Motion and reasons the relief should be granted are: I have been previously granted poor person status at the commencement of this Action by the lower Court and I am a poor person incarcerated at Southport Corr. Fac., PO Box 2000, Pine City, New York, 14871, in the county of Chemung and State of New York.

Sworn to before me this _28_
day of _June_ 1999

_____
Notary Public

_____
Jose Peralta, 95-A-2340
Petitioner, Pro-Se

**APPENDIX I**

Jose Peralta
95-A-2340
Southport Corr. Fac.
PO Box 2000
Pine City, New York 14871

Hon. Martin H. Browstein
Clerk
Appellate Division, Supreme Court
Second Judicial Department
45 Monroe Place
Brooklyn, New York 11201

June ____, 1999

RE: Matter of Peralta v. Jones
Index No. # 5231/98
Docket No. # 99-054445

Dear Hon. Browstein

I write your office to inquire about the status of my Article 78 proceeding that

**MISSING TEXT OR PAGE – NOT HERE**

**APPENDIX J**

Jose Peralta
95-A-2340
Southport Corr. Fac.
PO Box 2000
Pine City, New York 14871

Martin H. Brownstein
Clerk of the Court
Appellate Division,
Supreme Court
Second Judicial Department
State of New York
45 Monroe Place
Brooklyn, New York 11201

July 15, 1999

RE: Matter of Peralta v. Jones
Docket No. 99-05445

Dear Hon. Brownstein

This is in response to your letter dated July 7, 1999 in which you acknowledge receipt of my letter and informed me that my transferred Article 78 proceeding must be perfected in your Court in the same manner as an appeal. You also informed me that I could make an application to your Court requesting to proceed as a poor person in this matter and asking your Court permission to allow me the opportunity to proceed in this appeal on the original papers (the lower Court file) instead of filing a record or appendix.

Presently, I would like to draw your attention to my previous letter received by your office on July 6, 1999 because their seems to be a misunderstanding.

The July 6, 1999 letter/Motion packet, contained a letter in which I explained my present predicament, a format request to proceed in this matter on the original papers and a

notice of appeal; motion to proceed as a poor person and supporting affidavit.

From your letter it seems that your office has overlooked my notice of appeal; motion to proceed as a poor person and supporting affidavit and has not formally filed my motion or placed it on the calendar.

Enclosed you shall find a copy of the original July 6, 1999 letter/Motion packet and I request at this moment that your office formally place the entire letter/Motion packet on the Calendar so that it can be considered by the Honorable Justices in your court and a decision/order rendered on my request.

I would like to thank you in advance for your time an co-operation in this matter. I faithfully await your response.

Respectfully yours,

_____